UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELLIOTT ABRAMS, **CRAIG SEEGMILLER, VINCENT GLASS, ROBERT REEVES, JERAMINE CAMPBELL, and LAMONT HEARD,** individually, and on behalf of all others similarly situated,

Plaintiffs,

-v-

WILLIS CHAPMAN, Warden, Macomb Correctional Facility (MRF) ; **NOAH NAGY**, Warden at G. Robert Cotton Correctional Facility (JCF); **MELINDA BRAMAN**, Warden, Parnall Correctional Facility (SMT); **BRYAN MORRISON**, Warden Lakeland Correctional Facility (LCF); **HEIDI WASHINGTON**, Director of the Michigan Department of Corrections, sued in their official capacities only,

Defendants.

Case No. 2:20-cv-11053-MAG-RSW
Hon. Mark A. Goldsmith
Maj. Judge R. Steven Whalen

PLAINTIFF'S MOTION FOR CLASS CERTIFICATION
AND
BRIEF IN SUPPORT

Plaintiffs, Elliott Abrams, Craig Seegmiller, Vincent Glass, Robert Reeves, Jermaine Campbell, and Lamont Heard, on behalf of themselves and all others similarly situated, by and through their counsel, Daniel E. Manville, Michigan State University Clinical Law Professor, move this Court, to certify a class pursuant to Fed.

R. Civ. P. 23(a), (b)(1) and (b)(2), as well as four subclasses. This class action seeks to require Defendants, wardens from around the State and Director of the MDOC, to implement procedures that provide reasonable medical care for Plaintiffs and keep them reasonably safe from contracting communicable disease while in custody.

1. Plaintiffs propose to certify a class composed of all inmates who currently are, or who in the future will be, incarcerated in the MDOC's custody, at its different prisons, and who are subjected to the MDOC's policies and practices regarding COVID-19. This present class would be more than 37,000 prisoners.

2. Plaintiffs also seek to represent five subclasses of MDOC's inmates:

A. First subclass would be those inmates who are **Double Bunked** in individual cells and are not able to engage in social distancing as required by the CDC guidelines based on the conditions within the housing units.

B. Second subclass would be those inmates who are confined in **Pole Barns** that have two sections, with each section containing at least 20 cubes, holding 8 inmates in an area of 8'x12'.

C. The Third Subclass would consist of those inmates who have been designated by medical staff as **Chronic Care** inmates and according to the CDC are at high risks of severe illnesses from COVID-19 infection, including death – these high-risk conditions include:

- People aged 65 or older;

- People with chronic lung disease or moderate to severe asthma;
- People who have serious heart conditions;
- People who are immunocompromised including cancer treatment; and
- People of any age with severe obesity (body mass index [BMI] >40) or certain underlying medical conditions, particularly if not well controlled, such as those with diabetes, renal failure, or liver disease.

D. The fourth subclass would be those prisoners confined in **open cellblocks** where the spread of the COVID-19 cannot be controlled.

E. The fifth subclass would be those prisoners who are confined in cell blocks who have **tested negative** where staff have housed inmates that have **tested positive** and have taken no or limited medical precautions to prevent the spread of COVID-19 to all the other inmates confined in the same cell block.

Introduction

3. This case is about Defendants' failure to act to protect the lives of prisoners from novel coronavirus and its resulting disease, COVID-19. Defendants have failed to respond adequately to the urgent threat posed to people confined in prisons across Michigan during this growing and lethal pandemic. Defendants omissions make it

impossible for the incarcerated class members to observe the precautionary steps necessary to keep themselves safe, such as social distancing, increased personal hygiene, sanitizing one's personal environment, access to testing, and wearing protective clothing. Defendants' disregard of the known risks of illness and death exposes all prisoners to a highly fatal infectious disease in violation of their rights under the Eighth Amendment. Plaintiffs challenge these unconstitutional conditions and now move for class certification under Federal Rules of Civil Procedure 23(a) and 23(b)(1) and (b)(2). Plaintiffs also move for appointment of the undersigned as class counsel under Rule 23(g).

4. Class certification is warranted because Plaintiffs seek declaratory and injunctive relief to address the unconstitutional conditions that prevail in the prisons. *See* Fed. R. Civ. P. 23(b)(2) (allowing class certification where "final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole"). These conditions pose similar health risks to Plaintiffs and all putative class members by exposing them all (as well as prison staff and the public at large) to a serious risk of infection and, as a result, serious and lasting bodily harm—up to and including death. Resolving Plaintiffs' claims requires answering the same common questions of law and fact by finding that the conditions in the jail violate the Eighth Amendment. A declaratory judgment and injunction on behalf of the entire class will remedy these issues for all class members. There are far too many class members,

and the class and subclasses are too fluid, to efficiently resolve these questions individually. The named Plaintiffs and their counsel are dedicated to vindicating the constitutional rights of the proposed class members. Counsel will provide quality representation for the interests of proposed class members—just as they have for other similar classes of incarcerated people in the State of Michigan.

5. Each prison in Michigan is a ticking time bomb—a mass outbreak of COVID-19 is imminent due to conditions that create a breeding ground for the rapid transmission of this virus. Necessary social distancing is next to impossible inside Michigan's prisons because inmates are either (1) confined two person to a cell; (2) confined in cubes in Pole Barn with 8 inmates to a cube and 20 set of cubes on each side of the Pole Barn; (3) inmates placed in dayrooms, gym and class rooms up to sixty people are forced to live in the same jail cell where dozens of bunk beds are placed only one to three feet apart. (**Ex. 17, Anderson, ¶ ¶7-8; Ex. 18, Cantrell, ¶¶7-9; Ex. 19, Hawkins, ¶¶12, 14; Ex. 21, Hodges, ¶¶8-9; Ex. 24, Szenay, ¶¶5-6**).

6. Toilets, sinks, and showers are shared without disinfection between each use; inmates are being fed in chow halls or the Pole Barns without social separation; people exhibiting COVID-19 symptoms are being held in the same cells or housing units with people who are asymptomatic. (**Ex. 8, Seegmiller, ¶ 2; Ex. 12, Cambpell,**

¶4; Ex. 13, Heard, ¶2) and (**Ex. 11, Glass, ¶¶2-4, confined with those who tested positive**).

7. There is no way for incarcerated people to keep their cells or the filthy shared toilets and showers clean and hygienic. **(Ex. 17, Anderson, ¶6; Ex. 25, Winbush, ¶¶ 4, 5 and 14; Ex. 26, Lyons ¶4**).

8. Defendants' policies and practices violate the rights of all class members to be free from cruel and unusual punishment. U.S. Const. amend. VIII. A prison's failure to protect the medical needs of the inmates will result in cruel and unusual punishment if consciously ignored. *Brown v. Plata*, 563 U.S. 493, 510 (2011) (citing *Estelle v. Gamble*, 429 U.S. 97, 103 (1976)). *See DeShaney v. Winnebago County Dept. of Soc. Services*, 489 U.S. 189, 200 (1989) ("[W]hen the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—e.g., food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause."). Plaintiffs seek class-wide declaratory and injunctive relief declaring the conditions under which the entire class is detained to be unconstitutional, and ordering that conditions be immediately and drastically improved. In the case of the Chronic Care Subclass, that they be immediately separated from other prisoners and placed in a prison or housing units that will allow

social distancing given the immediate and severe health risk posed by the conditions, conditions that cannot be abated rapidly or starkly enough to protect these medically vulnerable individuals.

Legal Analysis of Rule 23 Requirements

A. *Requirements of Rule 23(a)*

A party seeking to certify a class action must demonstrate that the class is "ascertainable," satisfies the prerequisites of Rule 23(a), and qualifies under at least one of the three subsections of Rule 23(b).[1] *See Jamie S. v. Milwaukee Pub. Sch.*,

[1] (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
(1) the prosecution of separate actions by or against individual members of the class would create a risk of
(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or
(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient

668 F.3d 481, 493 (7th Cir. 2012). Rule 23(a) requires (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy of representation. Fed. R. Civ. P. 23(a). "A party seeking class certification must meet the burden of establishing each prerequisite before a suit may proceed as a class action." *Clemons v. Norton Healthcare Inc. Retirement Plan*, 890 F.3d 253, 278 (6th Cir. 2018) (noting Rule 23"(a)" requirements are numerosity, commonality, typicality, and adequate representation). Plaintiffs meet the four requirements for Rule 23(a) and 23(b)(2).

While the Court must perform a "rigorous analysis" to determine whether to certify a class, *Wal-Mart v. Dukes*, 564 U.S. 338, 351 (2011), the Court may not require the plaintiffs to prove their claims at the class certification stage. *See Amgen Inc. v. Conn. Retirement Plans & Trust Funds,* 568 U.S. 455, 466 (2013) (warning "[m]erits questions may be considered . . . only to the extent . . . that they are relevant to determining whether the Rule 23 prerequisites for class certification are satisfied"). At the certification stage, Plaintiffs need only provide evidence to demonstrate that Rule 23 itself is satisfied; certification is not a "dress rehearsal for the trial on the merits." *In re Whirlpool Corp. Front-Loading Washer Prods. Liab.*

> adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

Litig., 722 F.3d 838, 851–52 (6th Cir. 2013) (internal quotations and citation omitted). Moreover, "it is not always necessary . . . to probe behind the pleadings before coming to rest on the certification question, because sometimes there may be no disputed factual and legal issues that strongly influence the wisdom of class treatment." *Gooch v. Life Investors Ins. Co. of Am.*, 672 F.3d 402, 417 (6th Cir. 2012) (internal quotations and citation omitted).

Class certification is particularly favored when, as here, the named Plaintiffs assert civil rights claims that are of a fleeting or transitory nature, such that mootness concerns would make it difficult or impossible for individuals to litigate the issues outside of the class context. *See Johnson v. City of Opelousas*, 658 F.2d 1065, 1070 (5th Cir. 1981) (noting that "the substantial risk of mootness presented by the facts of this dispute was sufficient to create a need for certification"); *see also Penland v. Warren Cty. Jail*, 797 F.2d 332 (6th Cir. 1986) (citing *Johnson* with approval); *Cmtys. for Equity v. Michigan High Sch. Athletic Ass'n,* 192 F.R.D. 568, 575 (W.D. Mich. 1999). Due to the spread of the COVID-19 virus in the prison system, there is no telling if any of the members will live for the duration of this lawsuit.

1. Rule 23(a)(1) – Numerosity

Given that all current and future inmates will be subjected to the COVID-19 virus, joinder of all MDOC inmates would be impracticable. "Impracticable," for the purpose of Rule 23, does not mean "impossible"; rather, the named Plaintiffs must

show that the number of allegedly affected individuals is sufficiently large that "[i]t would be extremely difficult or inconvenient to join all members of the class." *See generally* 7A Charles A. Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1762 at 176 (3d ed. 2005) (footnote omitted); *see also* 1 Alba Conte & Herbert Newberg, *Newberg on Class Actions* § 3:3 at 225 (4th ed. 2002) (noting "[w]here the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied"). Cases have shown that at least 50 members are sufficient to satisfy a class:

> There is no "strict numerical test" that must be met for a class to be certified. *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 523, n. 24 (6th Cir.1976). The requirement can be satisfied with a class size as low as 35 people. See *Afro Am. Patrolmen's League v. Duck*, 503 F.2d 294, 298 (6th Cir.1974) (finding class sufficiently numerous at 35); *Ham v. Swift Transp. Co., Inc.*, 275 F.R.D. 475, 483 (W.D.Tenn.2011) ("Where the number of class members exceeds forty, Rule 23(a)(1) is generally deemed satisfied."); *Kizer v. Summit Partners, L.P.*, 1:11–CV–38, 2012 WL 1598066 at *4 (E.D. Tenn. May 7, 2012) ("In the WARN Act context, several courts have found that the numerosity requirement was satisfied when at least 50 employees were in the class.").

Calloway v Caraco Pharm Labs., Ltd, 287 FRD 402, 406 (E.D. Mich. 2012). The class consists of every inmate incarcerated in Michigan. That number is over 37,000 inmates, and easily satisfies the numerosity requirement.

Plaintiffs' counsel estimates that the subclass of double bunking would be over 4,000. The subclass of those confined in the pole barns would be more than 2,000. The subclass of the Chronic Care inmates would be over 550 inmates just

confined at the Lakeland prison, and the total for all prisons would be in the thousands. The subclass of those inmates confined in the dayrooms, gyms and classrooms would be over 500 inmates.

2. Rule 23(a)(2) – Commonality

In *Wal-Mart v. Dukes*, the Supreme Court rejected superficial common questions, such as whether each class member "suffered a violation of the same provision of law." 564 U.S. 338, 350 (2011). The Court held that the common connection "must be of such a nature that it is capable of class-wide resolution– which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* Applying this standard, the Court reversed the district court's certification of a class of female Wal-Mart employees because the alleged discriminatory employment decisions were not made pursuant to uniform policy or practice. *Id.* at 359. The fact that Wal-Mart's local managers used their discretion to make employment decisions vitiated the common question of whether the decisions were discriminatory. *Id.* at 356.

In this matter, each Defendant has not enforced a social distancing policy of six feet within housing, in the chow hall, or in the yard; each Defendant has allowed the Chronic Care inmates to be housed in units with inmates susceptible to the COVID-19 virus; each Defendant has placed inmates who tested positive in units with those who have not testified positive. The common questions of fact and law

turn on the lack of prophylactic steps taken by high level officials in the prison system, underscoring their deliberate indifference to the substantial risk of harm presented by COVID-19.

The claims asserted on behalf of the proposed class include common questions of law and fact that satisfy Rule 23(a)(2). Commonality requires that the class members' claims "depend on a common contention" of fact or law such that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Dukes*, 564 U.S. at 350. Courts must "start from the premise that there need be only one common question to certify a class." *In re Whirlpool Corp. Front-Loading Washer Products Liability Litigation*, 722 F.3d 838, 853 (6th Cir. 2013). Courts find common questions of both law and fact "at a high level of generality." Newberg on Class Actions § 3:19 (5th ed.) (internal quotations and citation omitted).

Commonality also requires these common questions "to generate common *answers* apt to drive the resolution of the litigation." *Dukes*, 564 U.S. at 349 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 132 (2009) (emphasis in original)). These "common answers" must "relate[] to the actual theory of liability in the case." *Rikos v. Procter & Gamble Co.*, 799 F.3d 497, 505 (6th Cir. 2015); *see also Cmtys. For Equity v. Michigan High School Athletics Ass'n*, 192 F.R.D. 568, 572 (W.D. Mich. 1999); Newberg on Class

Actions § 3:20 (5th ed.) ("When the party opposing the class has engaged in some course of conduct that affects a group of persons and gives rise to a cause of action, one or more of the elements of that cause of action will be common to all of the persona affected.").

Accordingly, courts in the Sixth Circuit have repeatedly certified class actions in which incarcerated people challenge the circumstances or conditions of their detention. *See Dearduff v. Washington*, 330 F.R.D. 452 (E.D. Mich. 2019) (granting in part and denying in part a class motion on dental care in Michigan's prison system); *McBride v. Michigan Dept. of Corrections*, No. 15-1122, 2017 WL 3085785 (E.D. Mich. July 20, 2017) (certifying class of deaf and/or hard of hearing prisoners), see Exhibit 18; *Smith v. Ohio Dep't of Rehab. and Corr.*, No. 2:08–CV–15, 2012 WL 1440254 (S.D. Ohio April 26, 2012) (certifying class of prisoners suffering exposure to high levels of asbestos), *see* Exhibit 19; *Hiatt v. County of Adams, Ohio*, 155 F.R.D. 605, 609 (S.D. Ohio 1994) (finding commonality satisfied where "[t]he conditions, policies and practices challenged" in the carceral setting impacted all detained people); *Gorton v. Johnson*, 100 F.R.D. 801 (E.D. Mich. 1984) (certifying class of incarcerated people challenging mental health treatment provided to them); *Glover v. Johnson*, 85 F.R.D. 1, 5-6 (E.D. Mich. 1977) (certifying class of female prisoners who challenged the MDOC's unconstitutional policies in providing women with inferior educational and vocational programs).

The core theory of this case alleges that the Defendants inflict constitutional injuries on each member of the proposed class. Specifically, Defendants unconstitutionally confine Plaintiffs in unsafe and unhygienic conditions prevailing in the prison, ignoring the concomitant risks of contracting COVID-19. All class members suffer the same injury, namely an unconstitutional risk of exposure to an extraordinarily dangerous disease. And all members of the Chronic Care Subclass share a greatly elevated actuarial risk of suffering death or permanent organ damage or failure.

These injuries are "capable of classwide resolution," *Rikos*, 799 F.3d at 505 (quoting *Dukes*, 564 U.S. at 350), because the Court can issue a single declaration finding that the conditions in the prison to be in violation of the Eighth Amendment and ordering immediate measures to address the conditions. And a single additional remedy mandating separate placement of the Chronic Care Subclass can address the increased risk to the subclass. In sum, this case goes far beyond the "single common question [that] will do." *Dukes*, 564 U.S. at 359 (internal quotations and citation omitted). Indeed, most questions of fact and law that will arise in this suit are common across the class. Among the most central common questions of fact are:

-What measures did Defendants implemented in the prisons in response to the COVID-19 crisis;

-Whether the conditions maintained by the Defendants in the prisons are sufficient to prevent an unreasonable risk of the spread of COVID-19;

-Whether Defendants' practices during the COVID-19 pandemic expose people in the prisons to a substantial risk of serious harm;

-Whether Defendants knew of and disregarded a substantial risk of serious harm to the safety and health of the class and subclasses; and

-Whether COVID-19 presents a heightened risk of harm and potential death to the Chronic Care Subclass.

Among the most important common questions of law are:

-As to the entire class: whether the conditions in which the class is confined are objectively unreasonable given the health risks to class members.

-As the Chronic Care Subclass: whether the threat of harm or death to members of the subclass is so severe that the only constitutionally permissible way to protect them is to place them all in a separate cell block or separate prison.

Defendants may claim that each prisoner is affected differently from the COVID-19 virus so there cannot be commonality. This argument was rejected in *McBride v. Michigan Dep't of Corr.*, where the class consisted of deaf and/or hard of hearing prisoners. Magistrate Judge Grand rejected that argument because it "runs counter to a broad body of Sixth Circuit case law, which has consistently held that the commonality requirement demands that claims share only a single issue, not be identical." *McBride v. Michigan Dep't of Corr.*, No. 15-CV-11222, 2017 WL 3097806, at *5 (E.D. Mich. June 30, 2017), *report and recommendation adopted*, No. 15-11222, 2017 WL 3085785 (E.D. Mich. July 20, 2017) (citing *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 884 (6th Cir. 1997)), *see* Exhibit 18; *Rikos v.*

Procter & Gamble Co., 799 F.3d 497, 508-09 (6th Cir. 2015); *Whirlpool*, 722 F.3d at 853; *Fallick v. Nationwide Mut. Ins. Co.*, 162 F.3d 410, 424 (6th Cir. 1998)).

As Chief Judge Feikens once explained in *Glover v. Johnson*, 85 F.R.D. 1, 4-5 (E.D. Mich. 1977) (quoting *Sweet v. General Tire & Rubber Co.*, 74 F.R.D. 333, 335 (N.D. Ohio 1976):

> Clearly each individual member of the class has a unique situation and has been affected in diverse ways by the alleged discriminatory policy. That there are differences in situation and effect does not preclude a finding by this Court of commonality. That each class member's case is in other ways unique does not affect the commonality of the action, as long as the members of the class have allegedly been affected by a general policy of the defendant, and the general policy is the focus of the litigation.

See also Dowdy-El v. Caruso, No. 06-11765, 2012 WL 6642793, at *4 (E.D. Mich. Aug. 15, 2012), *report and recommendation adopted*, No. 06-11765, 2012 WL 6642763 (E.D. Mich. Dec. 20, 2012) (quoting same passage), *see* attached Exhibit 20; *McBride*, No. 15-CV-11222, 2017 WL 3097806, at * 6 (same), Exhibit 18. Magistrate Judge Grand has also explained that commonality is met in "cases involving enforcement of a uniform policy of procedure, including those relating to prisoners, are often approved as class actions because they involved questions of fact and law common to all members . . . when 'inmates have a common interest in preventing the recurrence of the objectionable conduct.'" *Id*. at *5 (quoting *Jones v. Goord*, 190 F.R.D. 103, 111 (S.D.N.Y. 1999)).

The case here is like *McBride*, *Glover*, and *Dowdy-El* in that, all prisoners who are subjected to the COVID-19 virus but might be affected in different ways. Some could be asymptomatic, others could become mildly infected, or others might die within a few days. The different ultimate effect that COVID-19 might have on the different class members does not prevent this Court from finding commonality. *Parsons v. Ryan*, 289 F.R.D. 513, 521 (D. Ariz. 2013), *aff'd*, 754 F.3d 657 (9th Cir. 2014) (noting "[i]t matters not that each inmate may suffer from different ailments or require individualized treatment because commonality may be met where 'the claims of every class member are based on a common legal theory, even though the factual circumstances differ for each member'") (internal citation omitted).

In this case, Plaintiffs' two expert have "identified several accommodations that would address the needs of all or most class members" subject to the COVID-19 virus. The main accommodation is to separate everyone by 6-feet. At this stage, social distancing is basic common sense in the outside world. The MDOC's system-wide failure to implement any sort of policy requiring 6-feet social distancing is the basis of this lawsuit. Such a policy "would benefit all prisoners." *McBride*, No. 15-CV-11222, 2017 WL 3097806, at * 6, Exhibit 18. Despite specifically varying COVID-19 symptoms among class members, MDOC's policy and this Court's remedy would affect them the same. That is all the "commonality" a class requires.

In short, common questions of fact and law pervade this case, satisfying the Rule 23(a)(2) commonality requirement.

3. Rule 23(a)(3) – Typicality

In *In re American Medical Systems, Inc.*, 75 F.3d 1069 (1996), the Sixth Circuit explained that "a plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." *Id.* at 1082 (citation omitted). The conduct complained of in this complaint is the failure to provide protection from COVID-19 within the MDOC's prisons.

Plaintiffs in this case have claims typical of all of the members of the class, i.e., of all of the people incarcerated in the prison. To meet the typicality requirement, the named plaintiffs' claims must be "typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). "The commonality and typicality requirements of Rule 23(a) tend to merge." *Dukes*, 564 U.S. at 349 n.5. And, "[l]ike the test for commonality, the test for typicality is not demanding and the interests and claims of the various plaintiffs need not be identical." *Reese v. CNH Am., LLC,* 227 F.R.D. 483, 487 (E.D. Mich. 2005).

"A claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and if [the] claims are based on the same legal theory." *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 561 (6th

Cir. 2007). So long as the class and its representatives have similar legal theories arising from the same practice or course of conduct, the requirement is met "even if substantial factual distinctions exist between the named and unnamed class members." *Rankin v. Rots*, 220 F.R.D. 511, 518 (E.D. Mich. 2004).

Courts in the Sixth Circuit have consistently found prisoners' claims to be "typical" of the class they propose to represent where the claims arise from policies or conditions at an institution affecting all members of the proposed class. In *Glover*, 85 F.R.D. at 5-6, Chief Judge Feikens held that plaintiffs' claims regarding the Department of Corrections' policies were typical of those of the class, regardless of whether each class member was "identically situated." In *Smith v. Ohio Dept. of Rehabilitation and Correction*, No. 2:08-cv-15, 2012 WL 1440254 at *4-5 (S.D. Ohio Apr. 6, 2012), *see* Exhibit 19, the court found that a prisoner's claims regarding asbestos at the prison were typical of those of the class of prisoners he sought to represent because they arose "from the same events, practice or course of conduct." And in *Brown v. city of Detroit*, No. 10-12162, 2012 WL 4470433 (E.D. Mich. Sept. 27, 2012), *see* Exhibit 21, the court held that the named plaintiff raised claims that were typical of those of the proposed class of pretrial detainees where he was detained for a substantial amount of time without bedding and for more than 48 hours without a probable cause hearing. *See also Eddleman v. Jefferson County*, 96 F.3d 1448, 1996 WL 495013 at *4 (6th Cir. 1996) (unpublished) (typicality requirement

met where plaintiffs challenged county jail's blanket strip search policy even though individual searches varied in scope).

Each named Plaintiff's claim is based on the same or similar conditions in the prisons that do not provide adequate protection for the health and safety of the people incarcerated there. Every named Plaintiff (and every class member) is subject to harm as a result of the unhygienic conditions in the prison. To the extent conditions vary in different prisons or buildings of the prisons, all inmates are still similarly impacted given that they all risk similar transmission vectors such as guards, contract workers and transporting inmates from one prison to another.

In other words, the named Plaintiffs' experiences exemplify the ways that the prison's Policies and Practices harm the members of the class and demonstrate that the harms arewidespread across all types of class members.

4. Rule 23(a)(4) – Adequacy of Representation

The Sixth Circuit has articulated two criteria the court should examine in determining adequacy of representation: "1) the representative must have common interests with the unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *In re American Medical System*, 75 F.3d at 1083 (quoting *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 (6th Cir. 1976)). *In re American Medical System* also acknowledges that "[t]he adequate representation requirement overlaps with the

typicality requirement because in the absence of typical claims, the class representative has no incentives to pursue the claims of the other class members." *Id.* Typicality, or the "common interests" of the first criteria of adequacy has already been demonstrated.

Beattie v. CenturyTel, Inc., 511 F.3d at 562-63, expanded on the question of qualified counsel: adequacy requires a determination "whether class counsel are qualified, experienced and generally able to conduct the litigation, and to consider whether the class members have interests that are not antagonistic to one another." *Id.* (quoting *Stout v. J.D. Byrider*, 228 F.3d 709, 717 (6th Cir. 2000)).

Professor Daniel Manville is recognized as an expert in the area of the rights of prisoners. The class may be assured that its interests will be vigorously prosecuted through the Civil Rights Clinic, Michigan State University College of Law. Attorney Manville has been class counsel in the matter of *Johnson v. Martin*, Case No. 2:00-cv-75, 2005 WL 3312566 *1 (W.D. Mich. Dec. 7, 2005) (class consisted of over 1000 prisoners), *see* Exhibit 22. Presently Professor Manville is co-counsel in two other class actions in this court. *Ackerman v. Washington*, No. 12-14137 (E.D. Mich. Aug. 21, 2018), ECF No. 157 (class of approximately 80 Jewish inmates) and *Dearduff v. Washington*, 330 F.R.D. 452 (order granting partial class action certification regarding dental issues).

WHEREFORE, this Court should grant this motion as to the class and the subclasses for the reasons stated above.

Respectfully submitted,

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PROOF OF SERVICE

I, Daniel E. Manville certify, under penalty of perjury, that on April 30, 2020 , I caused a copy of the above document to be served by Email on Cori Barkman and Kevin O'Dowd, AGs in the Corrections Division, Attorney's Office due to the filing of an emergency motion for temporary restraining order and motion for class certification AND ALSO ECF IF COUNSEL HAS FILED AN APPEARANCE FOR DEFENDANTS.

/s/ Daniel E. Manville
Daniel E. Manville

UNITED STATES DISTRICT COURT
IN THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ELLIOTT ABRAMS, **CRAIG SEEGMILLER, VINCENT GLASS, ROBERT REEVES, JERAMINE CAMPBELL, and LAMONT HEARD,** individually, and on behalf of all others similarly situated,

Plaintiffs,

-v-

WILLIS CHAPMAN, Warden, Macomb Correctional Facility (MRF) ; **NOAH NAGY**, Warden at G. Robert Cotton Correctional Facility (JCF); **MELINDA BRAMAN**, Warden, Parnall Correctional Facility (SMT); **BRYAN MORRISON**, Warden Lakeland Correctional Facility (LCF); **HEIDI WASHINGTON**, Director of the Michigan Department of Corrections, sued in their official capacities only,

Defendants.

Case No. 2:20-cv-11053-MAG-RSW
Hon. Mark A. Goldsmith
Maj. Judge R. Steven Whalen

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Motion to Grant Class Certification

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DECLARATION OF ELLIOTT ABRAMS, 974262

I, Elliott Abrams, under the penalty of perjury, states the following:

1. Presently I am confined at Macomb Correctional Facility, located in Lenox, Michigan. I am required to share a cell with another inmate. Since his incarceration, MDOC has recognized that he has a compromised immune system.[1]

2. My parole date is next year. I am scared that I will not live that long. Based on the manner that I am forced to share a cell with another inmate and that there seems to be little if no effort to enforce social distancing and sanitizing of common areas, I am surprised when I wake up each morning without having contacted COVID-19. I have seen inmates removed from this prison in body bags and I think how I would be the next one. I fear that I might die in prison from COVID-19.

3. Defendants have designated numerous cells at MRF to house two prisoners. Each cell includes 2 lockers, 2 desks, 2 chairs, a bunk bed, and the personal property (2 footlockers, 2 TVs, books, paperwork, clothes) of each inmate. At

[1] On April 13, 2020, I filed two grievances as to being subjected to COVID-19. One grievance was addressed to the Warden-Defendant and the other directed at the Director-Defendant. A response was provided to both grievances. The grievance against the warden was rejected claiming he was following policy. The grievance against the Director was rejected as being duplicative. I then sought 2d step grievance forms but have not received such forms yet.

Macomb Correctional Facility some of the cells do not have their own bathrooms. Instead at the beginning of each of the 4 levels or "wings", there is a community bathroom with 3 stalls. 2 urinals, 4 sinks with mirrors, and 2 wall mounted electric hand dryers. Two individual showers stalls are located at the beginning of each of the community bathrooms. Located by the stairs to each of the four wings are 2 telephones, a drinking fountain, a garbage can and a microwave. At least 16 inmates are now housed in the dayroom and these inmates are required to use the same bathroom, kiosk, microwave, telephone, and chow area in the housing unit as the other inmates.

4. I have observed that cleaning of commonly used areas is not consistently wiped down or cleaned.

5. The meals are now fed in the housing unit and inmates are not required to keep spacing of 6-feet while waiting to be serve their food. One person is allowed to use the microwave at a time. There are two telephone that are approximately 6 feet apart and there is no restriction limiting the telephone used to the roommates at the same time. Prison staff did implement a rule that only the two inmates in a cell could use the telephone at the same time. The enforcement of this policy lasted about a week. From what I have observed, it seems that the telephones are not sanitized after each use. There is a kiosk room in the unit that contains the Jpay system (similar to a computer which

allows inmates to send emails to family members and others) and a store kiosk, where twice a month inmates can order items from the prison store to be delivered to the housing unit. Staff, generally, will allow only the two inmates sharing the cell in the kiosk room at the same time. Plaintiff Abrams is not sure if the kiosk room is sanitized after each use. Plaintiff Abrams has observed the inmate porters undertake only one cleaning per each 8-hour shift. Each staff is required to do three shakedown each shift worked. Abrams has observed officer do shakedowns of more than one inmate at a time without changing gloves.

I have read the above declaration and find that it is true and accurate based on my observations and/or what staff has informed me.

I give permission to Counsel Daniel E. Manville to sign my name to this declaration due to the restriction placed on communications by prisoners with outside sources.

Date: 4-26-20 Signature: Elliott Abrams signed w/ permission

DECLARATION OF CRAIG SEEGMILLER, 373625

I, Craig Seegmiller, under the penalty of perjury, state the following:

1. I am presently confined within the Michigan Department of Corrections at Cotton Correctional Facility, located in Jackson, Michigan.

2. Seegmiller is confined in a Pole Barn at JCF. He is confined in a cube with at least 8 other inmates, in an area that is approximately 10'x12'. There is a total of 20 cubes, for a total population of 160 inmates on each side of the Pole Barn. Seegmiller is currently housed in T-A, one of two sides of the pole-barn. T-A and T-B each house one hundred and sixty (160) inmates. There are two bathrooms in each side of the pole barn. One for the front hall and one for the back hall. There are three (3) showers, three (3) urinals, and four (4) toilets for eighty (80) inmates in each hall. The ceiling in the cubicles is approximate twelve (12) feet high. There is an eight (8) foot divider wall resembling an open case between the back and front of the top of the divider. The ceiling in the cubicles is approximate twelve (12) feet high. There are two (2) JPAY computers, one (1) store kiosk, and five (5) telephones on each side and these are shared by the 160 inmates on each particular side. Plaintiff Seegmiller has not observed any of these items sanitized by prison porters after being used by prisoners. An individual prisoner may wipe one of these items down before using it. Prison staff has made available a limited supply of cleaning materials each day but once the cleaning supplies have been issued for that day none is available until the next day.

Exhibit 2 - Decl of Seegmiller

3. As of April 20, 2020, five of the inmates in my cube tested positive. When I heard that, I freaked out. I thought for sure that I also had CORVID-19 and there was nothing I would do about it. I was never tested. The only treatment I was given, if you can call it that, I was temporarily moved to the level 2 side of dorm D, a different housing unit, for approximately 36 hours. and was sent back to the level 1 side to the Pole Barn without first being tested.[1] I constantly live in fear that I will die next because I was given little medical care after five of my bunkies tested positive.

4. On April 17, 2020, in the afternoon, the officers in the Pole Barns at the Cotton Facility went through each Pole Barn and cut the electrical cord to each fan to prevent the spread of the spread of COVID-19 virus is what the officer told me. However, I was not provided social distancing while confined at the Cotton Prison to help prevent me from becoming infected. It is very fearful to be in prison with a pandemic, knowing that you could easily catch it, and die.

I have read the above declaration and find that it is true and accurate based on my observations and/or what staff has informed me.

I give permission to Counsel Daniel E. Manville to sign my name to this declaration due to the restriction placed on communications by prisoners with outside sources.

Date: 4-26-20 Signature: Craig Seegmiller signed w/permission

[1] I filed two grievances. One was against the Warden and the other against Director Washington on April 9, 2020. These grievances were returned to be on April 13, 2020. I filled out and submitted steps II's appeals for both grievance on April 17, 2020 but have not received responses.

Exhibit 2 - Decl of Seegmiller

DECLARATION OF ROBERT REEVES

I, Robert Reeves, under penalty of perjury, state the following:

1. I am presently confined at the G. Robert Cotton Correctional facility (JCF), Prior to my confinement at Cotton, I was confined at Parnall Correctional Facility (SMT) in Jackson, Michigan. At SMT, I contracted COVID-19 when I was house in 58-B 10 block at Parnall. I was only at Parnall from February 25, 2020, to March 28, 2020. At Parnall, I was confined in a one-man cell that had open bars. There are more than 300 prisoners confined in the open-bar setting. At Parnall, there are thirteen (13) open showers in 10-block for the use of 300 prisoners. At Parnall, I was allowed to go to chow hall. Prisoners stood in line with other prisoners, but once we got to the chow hall, we sat 2 at a table, about 2 feet from each other. However, prisoners walked to chow together without being told to distance from each other. At Parnall, I was only given a mask after I tested positive for COVID-19. However, I was forced to be around positive prisoners in the same block before I was tested.

2. When I was told that I tested positive for CORVIC-19, I was sure that within days I would be extremely sick and then die. The only care I received was that I was transferred from Parnall to Cotton on March 28, 2020 because I tested positive for COVID-19. When I arrived at Cotton, I was placed in a one-man cell, with closed quarters. The next day another positive inmate was placed in the cell with me.

3. I was given a mask on March 28th, and sixteen (16) days later, I still have the same mask. I was told to wash the mask that I have. When I tried to exchange my mask for a new one, I was told that they don't have extras.

4. On April 14th, staff were not wearing gloves or masks when handing out disbursements for the phone or at the desk. I could not help but consider that these guards don't care if I live or die by their attitudes and I realized that am helpless and can die.

5. At Cotton, there are two prisoners to a cell in a unit, called K-unit, that seems to house all positive tested inmates. These inmates share the same showers, bathroom, phones, and JPay Kiosks. Three (3) to six (6) inmates are allowed out at a time. There are 88 bunks, with 2 inmates to a cell in K-unit. Each cell is 11' x 8'. There are three (3) showers in K-unit, and one inmate is allowed in each shower at a time. I observed he bathroom in K-unit being cleaned only one time per day by an inmate who is positive for COVID-19.

6. There is a nurse in K-unit at all times and the nurse is wearing a mask. The nurse calls each prisoner out of their cell every day to take their blood pressure and temperature. Prisoners sit in the same chair, and the same medical equipment and supplies are being used without being cleaned between inmates. The nurses do not change their gloves from inmate to inmate.

7. I have not been given any supplies to clean my cell. There is a mop and broom in K unit for all prisoners to use; this is the same mop that is used to clean the bathroom.

8. Inmates are fed in their cells. I have not seen a doctor, nor did I receive medical instructions on what to do if my symptoms got worse, despite complaining of chest pain, coughing up blood, and having problems breathing. I was just told it was normal and to go through it. Being told by medical staff this is normal and just suck it up, created extreme levels of fear and anxiety. You cannot help but think that the medical staff do not care if you live or die.

9. Because I tested positive for COVID-19, I am not allowed to send kites, mail, or grievances.

10. After 21 days in quarantine at JCF- Cotton, I was transferred to Gus Harrison in Adrian, Michigan. At Gus Harrison, I am allowed to send out mail and write grievances, but because I keep being transferred, it is hard to get the grievance responses back from the Grievance Coordinator, or a receipt that the grievance was received.

11. Due to prison staff not requiring social distancing, I cannot help but believe MDOC does not care if inmates, such as me, die. Prisons can be violent places and inmates need to fear for their safety but to add to that fear that you right die from COVID-19 is totally unreasonable

I have read the above declaration and find that it is true and accurate based on my observations and/or what staff has informed me.

I give permission to Counsel Daniel E. Manville to sign my name to this declaration due to the restriction placed on communications by prisoners with outside sources.

Date: 4-26-20 Signature: Robert Reeves signed w/ permission Dan

DECLARATION OF VINCENT GLASS, 182453

I, VINCENT GLASS, under the penalty of perjury, states the following:

1. Presently I am confined at Parnall Correctional Facility, located in Jackson, Michigan.

2. I am now confined in 10-block in the type of cell that you see in old prison movies, with bars on the front. This cellblock holds approximately 370 inmates. Based on its design, there is no method for preventing the spread of the COVID-19 throughout that block.

3. I was told by officers that the Warden- Defendant Melinda Braman approved the placement of positive tested inmates within 10-block and took no additional steps to separate and protect plaintiff and the class members from the COVID-19 virus. A number of officers told me that numerous positive tested COVID-19 inmate had been placed in 10-block.

4. I feared for my life each day I was confined in 10-block. This fear came from the design of the building that did not allow social distancing, the placement of positive tested inmates in 10-block and the failure to require social distancing when using the showers, bathrooms, telephones, and kiosks. The same when going to chow, at the chow hall, and in the yard, there was no social distancing.

5. I am familiar with the description of 10-block provided by Plaintiff Mobreg, *supra*, and agree with the descriptions of the layout of 10-block and how its operate daily.

6. Glass was confined on the upper level of 10-Block. In order for him to leave his cell and go to the base to go to chow, to take a shower, or to use the telephone, Glass had to go within two feet of 10 to 30 prisoners, to get to the stairs that lead to the base. Once on base, if Glass went to use the telephone, Jpay, shower or chow, it was almost impossible not to be within 6-feet of numerous inmates.

I have read the above declaration and find that it is true and accurate based on my observations and/or what staff has informed me.

I give permission to Counsel Daniel E. Manville to sign my name to this declaration due to the restriction placed on communications by prisoners with outside sources.

Date: 4-26-20 Signature: /Vincent Glass signed w/ permission DEM

Exhibit 4 - Decl. Vincent Glass

DECLARATION OF JERMAINE CAMPBELL, 745168

I, Jermaine Campbell, under penalty of perjury, declare that the following is true and correct:

1. I am a prisoner housed at G. Robert Cotton Correctional Facility (JCF) in the Michigan Department of Corrections.
2. I have asthma and have been treated for asthma while housed in MDOC custody. Therefore, if I am exposed to COVID-19, it is very likely I could suffer severe medical complications.
3. Plaintiff Campbell lives in an 8-man style cube that is 20 feet by 10 feet. He sleeps within three feet away from three of my cube mates and he eat in the same area as other prisoners and cannot adhere to CDC standards for social distancing. I was given two (2) masks made out of state issued clothing. No replacement masks have been issued.
4. I am a parole violator and have served my minimum sentence. Therefore, I am parole eligible but have not been told when I will be released on parole. I am suffering from mental anguish, anxiety, and PTSD by not knowing if I will die or be exposed to COVID-19, or even when I may be released from Cotton Prison following the major flare up in here (with dozens infected) and some people dying. *See* Exhibit 2.

5. I am familiar with DOM 2020-29 or 30 (for COVID-19) issued by Director Washington. It is flagrantly being ignored by staff. For instance, Officer Dettloff was confirmed as having COVID-19 on April 18, 2010. Yet, although Dettloff has worked with Officer Divish and Officer Brown, they continued to come to our unit to work, and expose all of us in that unit to COVID-19, such as on Aril 20, 2010. We brought this to ARUS Parsons' attention, and she said these officers don't have to self-quarantine and told another inmate, in my presence, that he should not have come to prison and dying was basically part of life.

6. The attitudes of these prison staff are that they don't care whether inmates live or not. Confronted with such an attitude, I fear for my safety and whether I will live to see the future.

I have read the above declaration and find that it is true and accurate based on my observations and/or what staff has informed me.

I give permission to Counsel Daniel E. Manville to sign my name to this declaration due to the restriction placed on communications by prisoners with outside sources.

Date: 4-26-20 Signature: Jermaine Campbell signed w/permission DM

Plaintiff Lamont Heard, 252329 – Lakeland Correctional Facility

I, Lamont Heard, under the penalty of perjury, state the following:

1. Presently I am confined within the Michigan Department of Corrections at Lakeland Correctional Facility (LCF), in Coldwater, Michigan.

2. Heard is confined in Pole Barn E-2 at LCF, which means he is confined in a cube with at least 8 other inmates, in an area that is approximately 10'x12'. The height of the wall separating these Cubes is eight feet high. There are approximately 20 other cubes for a total population of 160 inmates on each side of the Pole Barn.

3. As to the cube in the Pole Barn where Plaintiff Heard is confined, the entire unit can leave their cubes starting at 5:50 am and are required to be locked down in the cubes at 11:30 pm. During the time not required to be in the cube, the inmates in Unit E-2 are allowed yard for approximately 30 minutes at least 10 times a day. During this time out of cubes, the inmates are able to commingle in the Pole Barn without social distancing.

4. I and other inmates were recently told by health service and prison staff that due to some inmates already testing positive in that unit and the other unit inmates in that unit already being exposed to these positive tested inmates, that there was no reason to quarantine any of the inmates.

5. Plaintiff Heard was informed by both medical and unit officers not to request medical care unless it was severe. However, when he asked what is considered severe, no one would tell him. Comments like that from staff

that I will wake up the next morning with no virus. Due to design of the Pole Barn, no social distancing in the Pole Barn, at chow, or in the yard, I fear that the odds are I will be infected and die in prison.[1]

6 This past week MDOC started testing all the inmates confined at Lakeland prison. As of April 23, 2020, the reported test results showed that 600 – or 40% of the population – have tested positive. MDOC has confirmed that not all tests results have been returned. Once I heard that I became convinced that I will only leave this prison in a body bag. I have observed numerous body bags being take out of Lakeland. I fear for my life.

7. Plaintiff Heard was given three masks and told that he had to wash them because staff would not provide more masks. Plaintiff Heard's temperature is not regularly taken

[1] On April 13, 2020, I filed two grievances. One grievance against the Warden for failure to protect against COVID-19 and the other grievance against the Director for her failure to protect me against COVID-19. I have received no response as to either grievance. The reasons for no responses might be that I observed the regular grievance coordinator working in the Pole Barn, in a position of correction officer.

8. Plaintiff Heard has observed prison staff pat downs inmates either without gloves or not changing gloves when they have completed the pat down of one inmate and patting down the next inmate.

I have read the above declaration and find that it is true and accurate based on my observations and/or what staff has informed me.

I give permission to Counsel Daniel E. Manville to sign my name to this declaration due to the restriction placed on communications by prisoners with outside sources.

Date: 4-26-20 Signature: Lamont Heard signed w/ permission DEM

DECLARATION OF DEMONTE ANDERSON, 795078

I, Demonte Anderson, under the penalty of perjury, state the following:

1. I am currently confined within the Michigan Department of Corrections at the G. Robert Cotton Correctional Facility (JCF) in Jackson, Michigan.
2. I am being housed in TA-128, which is in the pole barn.
3. There are 8 men per cube in the pole barn. There are 20 cubes on each side of the pole barn, totaling 160 men per side of the pole barn- 80 in the front side and 80 in the back side.
4. There are six showers for each side of the pole barn, 3 at the front side and 3 at the back side.
5. I was given three masks and required to reuse them. I am not able to exchange my masks.
6. I have been given no supplies to clean my cell or cube. I am not allowed to clean my area with bleach. I would get a major misconduct ticket if I did.
7. I am still being fed in the chow hall. Inmates are required to skip a seat between prisoners.
8. We are still being allowed yard time twice per day. All 900 prisoners are allowed at yard twice per day.

I have read the above declaration and find that it is true and accurate based on my observations and/or what staff has informed me.

I give permission to Counsel Daniel E. Manville to sign my name to this declaration due to the restriction placed on communications by prisoners with outside sources.

Date: 4/24/20 Signature: Demonlie Anderson signed w/ permission

DECLARATION OF JASON CANTRELL

I, Jason Cantrell, under the penalty of perjury, state the following:

1. I am currently confined within the Michigan Department of Corrections at Oaks Correctional Facility in Manistee, Michigan.
2. I am currently housed in Unit 7 in a double bunk cell.
3. On April 9, 2020, I received a mask that was made from sewn prison blues, which are made from polyester.
4. There have been no adjustments to how we are to clean our cells or our clothes.
5. During count, our door handles are being sprayed with bleach.
6. At night, the phones are being sprayed with bleach, but this is not being done during the day.
7. We are being fed in the chow hall and are required to sit two inmates to a table, which is approximately 2 ½ feet from one another.
8. There is no glass divider separating inmates from kitchen staff when we are receiving our trays.
9. There has been no change in yard schedules. I have observed groups of approximately 80 inmates on the yard together, with no social distancing being enforced.

10. We are using the same mop, sponges, toilet brushes, and disinfectant rags as our entire "rock," which holds 60 people.

11. I have observed guards patting down inmates without using gloves.

I have read the above declaration and find that it is true and accurate based on my observations and/or what staff has informed me.

I give permission to Counsel Daniel E. Manville to sign my name to this declaration due to the restriction placed on communications by prisoners with outside sources.

Date: 4/24/20 Signature: Jason Cantrell signed w/ permission

DECLARATION OF DAX HAWKINS, 532345

I, Dax Hawkins, under the penalty of perjury, state the following:

1. I am currently confined within the Michigan Department of Corrections at Kinross Correctional Facility in Kincheloe, Michigan. We are all housed in 8 temporary pole barn style building. The building is separated into 2 sides, (1 side and 2 side).

2. Within each of these buildings, there are 20 individual cubical measuring approximately 12' X 20' with 4 bunkbeds strategically placed, less than 6 feet apart along three of the cube's walls, housing 8 prisoners.

3. Each cube also has 8 large lockers, 8 chairs, 1 large table and personal property of each cube mate, including 8 TV's, state issued clothing and at least 8 personal footlockers.

4. The unit has a very narrow hallway on each side. The hallways run between 5 cubicals on each side. The hallways are wide enough for 2 way traffic to and from cubicals. Each wing is a single floor which house 80 inmates on each wing, a capacity of 160 inmates.

5. At KCF, the cubicals do not have their own bathrooms. Instead, at the entrance of each hallway is a community bathroom with 3 urinals, 4 toilet stalls, 7 sinks, 7 mirrors and 3 individual small shower stalls. There are no mounted electric hand dryers or hand soap dispensers.

6. Located right outside of each bathroom is a drinking fountain, and a garbage can beside one of the fountains on (1 side). There are also 3 phones in the front side lobby(1 side) and 3 additional phones next to the bathrooms on (2 side.)

7. There are 2 dayrooms, 3 microwaves and a TV in one of the day rooms. The other room is utilized as a quiet room.

8. Three people are allowed at the microwave at a time. However, the day room setting doesn't permit social distancing because it is also an activity room for watching television and card or board game playing.

9. There are 2 store kiosk on the (1side) lobby area. The activity day room where the TV and microwaves are also has 3 Jpay kiosk.

10. We have been issued face masks. We are mandated and expected to wear them only within the education building, the healthcare, the weight pit and whenever conversing with staff. These are the only times the guards enforce their purposes.

11. The masks are not however in accordance to CDC guidelines or regulations. They are made from thin rectangular shaped scrap khaki material and strips of bedding sheets sewn above the top and bottom for tying purposes.

12. We dine in a communal area where over 100 inmates are called to eat. Depending on which shift or which Sgt. is working determines if more will be packed in the communal area or whether it will be social distancing.

13. By prison policy staff are required to do a certain number of pat downs per shift. I have observed officers not change their gloves between pat downs exposing us to potential danger.

14. All 3 meals are fed in the communal area i.e. Chow Hall. Recently the staff have made efforts for inmates to stand 6 feet apart while standing in lines. However, the seating arrangements are not 6 feet. The tables that we are seated are elementary school type bleachers of some kind not for adults.

15. We are provided 2 to 3 rolls of tissue every week and 2 small bars of soap. Inmates are expected to clean their respective areas whenever they feel the need to. We are provided heavily watered-down bleach sprays and disinfectant that has to remain on the surface up to 10 minutes before it is effective.

16. Inmates assigned as porters are responsible for cleaning outside the cubicles and throughout the unit, such as day rooms, showers, restrooms, the lobby, officer's restrooms and the microwave and kiosk areas.

17. The facility is still running community laundry, which means that the laundry from every wing goes into one cart on (1 side) at one time and then brought to a laundering area where it is washed, dried and returned the same day. This is done 6 times a week. Inmates doing the laundry service are required to wear gloves or protective gear.

The things that I have experienced personally that are different from the rest of the population are as follows:

1) I am in remission from Hodgkin's lymphoma, I had cancer in my lungs.

2) I underwent chemotherapy and radiation which damaged my lungs.

3) I also have asthma, which I use an inhaler for.

4) On March 25-27, 2020, myself and my 7 other cube mates were put in quarantine at the URF facility across the street in the segregation unit.

5) We were double bunked and not given any of our personal property. Nor were we given deodorant or a change of underclothes.

6) We were not allowed to make phone calls or write our loved ones to let them know where we were at.

7) We were issued one mask and one pair of latex gloves which we had to use every time staff was at our door with food or medication.

8) We were treated as if we were segregation prisoners although we had done nothing wrong. When we tried to ask staff about what was going on we were ignored and talked to disrespectfully.

I have read the above declaration and find that it is true and accurate based on my observations and/or what staff has informed me.

I give permission to Counsel Daniel E. Manville to sign my name to this declaration due to the restriction placed on communications by prisoners with outside sources.

Date: 4-25-20 Signature: Dave Hawkins signed w/ permission

DECLARATION OF DWIGHT HENLEY, 246521

I, Dwight Henley, under the penalty of perjury, state the following:

1. I am presently confined within the Michigan Department of Corrections at Macomb Correctional Facility in Lenox, Michigan.
2. I am housed in Housing Unit 2, B-wing, top-bunk.
3. My Bunkie and I have been given cloth face masks. We are told to wash our masks- inmates are permitted to do laundry twice per week.
4. My temperature is not being taken.
5. In Housing Units 1, 2, and 3, the middle dayroom has been turned into a dorm and houses 16 prisoners. The dayroom is approximately 30 feet by 50 feet.
6. Prisoners in the dayroom use the toilets in the Housing Units.
7. Inmate porters are responsible for cleaning the toilets and showers, and each one cleans differently, if they choose to clean. Porters are given diluted bleach with water.
8. I have been told that the gym and a few classrooms have also been turned into dorms.
9. For the first week of quarantine, prisoners were still being fed in the chow hall. Now we are being fed in our cells.

10. Prisoner's that require medications are to line up in the Unit to receive their medication and are not told to stand 6-feet apart.

11. Officers are required to do a set number of pat downs per shift. I have observed officers using the same gloves to search multiple prisoners.

12. On April 15, 2020, I submitted two grievances, one against Warden Chapman, and the other against Director Washington.

13. My grievance against Warden Chapman and Director Washington was for failing to properly protect grievant from contracting COVID-19 in all, but not limited to, the following ways:

    a. Failed to implement measures to ensure staff don't carry COVID-19 into the prison and infect prisoners;

    b. Failed to ensure that staff engage in and enforce social distancing during food distribution, in the hallways, at prisoner phones, in prisoner bathrooms, and on base;

    c. Failed to test and segregate appropriately all prisoners who complain of COVID-19 symtoms;

    d. For moving prisoners from unit to unit without testing them for COVID-19;

    e. Failed to ensure prisoners report COVID-19 symptoms and determine which prisoners are infected.

14. The grievance coordinator returned the grievance against Director Washington to me because it was identical to the other grievance. However, while identical, the grievances grieved two different people.

15. I spoke to the grievance coordinator about this and submitted another grievance against Director Washington.

I have read the above declaration and find that it is true and accurate based on my observations and/or what staff has informed me.

I give permission to Counsel Daniel E. Manville to sign my name to this declaration due to the restriction placed on communications by prisoners with outside sources.

Date: 4/24/20 Signature: Dwight Henley signed w permission

DECLARATION OF MITCHELL HODGES, 495599

I, Mitchell Hodges, under the penalty of perjury, state the following:

1. I am currently confined within the Michigan Department of Corrections at Lakeland Correctional Facility in Coldwater, Michigan.
2. I am housed in a cube setting in Unit E2, which is a contaminated unit. There are 8 men per cube.
3. I was sick for five days with a fever and took aspirin to help with the fever. When I went to healthcare, I was brought through the waiting room without the room being cleared of other prisoners. The nurse took my temperature, but I did not have one because I had taken aspirin. I was then given a mask and taken back to general population.
4. The same day I was released from healthcare, I was called to chow hall. I wore the mask that I had been given. The Lieutenant came and made me take off the mask and stated that it was scaring people.
5. I am responsible for washing my own mask, and I am not able to exchange it for a new one.
6. It was only when COVID-19 had contaminated our Unit that we were given diluted bleach.
7. I observed staff bringing a whole cube to Quarantine, and then bringing the same men back to the Unit before the two-week quarantine process was up.

8. We were being fed in the unit, but then staff brought us back to chow hall before our quarantine was over. We are sitting 4 men to a table.
9. We are still being allowed yard time. Our whole Unit is allowed 30 minutes of yard 3 times per day.
10. I have observed officers searching inmates without wearing gloves.
11. I have observed officers not wearing masks and claiming that because they already had the virus, they can't catch it again.

I have read the above declaration and find that it is true and accurate based on my observations and/or what staff has informed me.

I give permission to Counsel Daniel E. Manville to sign my name to this declaration due to the restriction placed on communications by prisoners with outside sources.

Date: 4-24-20 Signature: Mitchell Hodges request of permission

DECLARATION OF TREVOR KILLIAN, 812131

I, Trevor Killian, under the penalty of perjury, state the following:

1. I am a prisoner currently confined within the Michigan Department of Corrections at the Gus Harrison Correctional Facility in Adrian, Michigan.
2. Prior to being transferred to Gus Harrison, I was confined at Parnall Correctional Facility in Jackson, Michigan.
3. At Parnall, I was forced to clean the gym and the weight pit that was being used to house prisoners that were positive for COVID-19, and I was not given protective gear. I was forced to do this because of my job as a porter.
4. If I were to refuse to clean the gym because of concerns for my health, I was told that I would get a misconduct violation.
5. After being forced to clean the gym, I tested positive for COVID-19.
6. I am currently in quarantine at Gus Harrison.
7. When I first arrived at Gus Harrison, I was told not to come out of my cell because it was important to social distance myself from others. The next day, another COVID-19-positive prisoner was placed in the cell with me.
8. My personal property is still at Parnall; officers are refusing to get it to me.

I have read the above declaration and find that it is true and accurate based on my observations and/or what staff has informed me.

I give permission to Counsel Daniel E. Manville to sign my name to this declaration due to the restriction placed on communications by prisoners with outside sources.

Date: 4/24/20 Signature: Trevor Killian signed w/ permission

DECLARATION OF EUGENE MARR

I, Eugene Marr, under the penalty of perjury, state the following:

1. I am a Level I prisoner currently confined at Cotton Correctional Facility in Jackson, MI.
2. I am being confined in the pole barn unit at Cotton Correctional Facility, which means that I am living with 160 men in a barn the size of a basketball court; social distancing is physically impossible.
3. I am a chronic healthcare patient with a compromised immune system.
4. I have a disease call sarcoidosis which attacks my immune system, lungs, and other organs inside of my body.

I have read the above declaration and find that it is true and accurate based on my observations and/or what staff has informed me.

I give permission to Counsel Daniel E. Manville to sign my name to this declaration due to the restriction placed on communications by prisoners with outside sources.

Date: 4/24/20 Signature: Eugene Marr signed w/ permission

DECLARATION OF LU SZENAY, 214992

I, Lu Szenay, under the penalty of perjury, state the following:

1. I am currently confined within the Michigan Department of Corrections at the Women's Huron Valley Correctional Facility in Ypsilanti, Michigan.
2. I am confined in Unit Gladwin-B. My Unit has approximately 28 two-man rooms, 8 three-man rooms, 2 six-man rooms, and 2 eight-man rooms.
3. Inmates in my Unit were given masks made of the cotton/polyester cloth that our pants are made of.
4. We are given handsoap to wash our hands in one sink out of the five sinks in the Unit. This soap runs out on the weekends.
5. We are permitted to go to yard and the recreational room when it is open.
6. We are permitted to go to the chow hall and medication lines, one Unit at a time. We are not required to social distance at during yard, in the chow hall, or in the med line.

I have read the above declaration and find that it is true and accurate based on my observations and/or what staff has informed me.

I give permission to Counsel Daniel E. Manville to sign my name to this declaration due to the restriction placed on communications by prisoners with outside sources.

Date: 4/24/20 Signature: Lu Szenay signed w/ permission

Exhibit 14 - Decl. of Szenay

DECLARATION OF ROBERT WINBURN, 222196

I, Robert Windburn, under the penalty of perjury, states the following:

1. Presently I am confined at G. Robert Cotton Correctional Facility ("JCF") located in Jackson, Michigan.
2. I am housed in general population in a cubical setting with 7 additional inmates. On Temp-Side where I am housed, we have 6 housing units (i.e., dorms).
3. Each cube includes a total of 8 lockers, 4 chairs, 4 bunk beds, 4 garbage cans, and the personal property (2 footlockers, 1 TVs, books, paperwork, clothes, of each inmate).
4. The unit in which I am housed is an open dorm with a front and back hall separated by a mid-wall open divider. Each hall has 10 cubes, with 8 inmates per cube. The cube is about 10 × 20. The housing unit has a capacity of 160 inmates (20 cubes with 8 inmates per cube). We are separated by less than 6 feet nearly everywhere we go.
5. On Temp-Side where I am housed, inmate cubicles do not have their own bathroom. Instead, at the beginning of each of the front and back halls, there is a community bathroom with 3 stalls, 3 urinals, 7 sinks with mirrors, and 2 wall mounted electric hand driers. Toilets, showers, and sinks are cleaned by unit porters, one time in morning, afternoon, and night. No bleach or

disinfectants are used. Instead, a citrus based cleaner that is watered down is used.

6. Three individual shower stalls are also located in community bathrooms. They are cleaned in the same manner as the sinks and toilets.
7. Located by the front of each hall is common lobby, two rooms (one for community television and one for community television and card tables). There main lobby has 2 JPAY machines for writing family or others, 1 kiosk, and 5 phones.
8. There are no contamination precautions for myself or my bunky, such as an available bleach bottle and rag to clean with.
9. Our temperatures were taken for the first time today (04/17/2020). Yet, we were forced to stand in lines tightly bunched together for temperature checks.
10. About 2 weeks ago, we were provided 2 masks that were made by inmates at MSI. They consists of one layer of cloth normally used to make state shirts. We have not been provided the ability to wash them.
11. The same health care personnel (HUM Landfair) is caring for both infected prisoners and non-infected prisoners. I have grieved this issue. It was rejected as non-grievable because it is a purported Warden's Forum issue. I am now at Step II. The grievance number is JCF/2020/04/0693/27Z.

12. We are still allowed phone calls (including legal calls) even on quarantine status, per MDOC DOM 2020-30 (Covid-19 Process). Yet, I have not been allowed to speak with Attorney Manville even though he scheduled a call to talk with me.

13. On March 30, 2020 at 5:55 pm Warden Nagy issued a directive that stated: "It is now mandatory that all staff and the prisoner population wear their mask at all time." However, I observed Officer Perhne refuse to obey the Warden's directive, and she is on camera on 4/20/2020 (at 10:15 pm until 12:30 am) not wearing a mask even though she worked in the contaminated TB-Unit. When I brought this to attention of Officer Perhne's supervising Sergeant, he said "so what" and they both threatened to put me in segregation.

14. There is no cleaning supplies (bleach) for each cube, but we can take the citrus based bottle from the bathrooms.

15. Normally we are fed in large groups in main chow hall with bench seating. However, since we are on quarantine status (as we have positives for Covid-19) our food is delivered to the dorm. There are no precautions taken when giving us our food on Styrofoam trays. In fact, we are called in groups and then we return to our cubes to eat. Our food is not delivered in hot boxes. Rather, it is put in cardboard boxes. It is cold (below required temperatures),

and there is no glass dividers between us and the inmates or guards when our tray is provided. On April 17, 2020, the officer passing our food was Officer Dettloff. This officer has had multiple close contact with Covid-19 prisoners, but he has not been placed on 14-day self-quarantine.

16. Being on quarantine status, we get 1 hour of yard twice per day with 160 inmates.

17. As of April 17, 2020, there have been multiple prisoners who tested positive for Covid-19 in our dorm. The prison is responding by taking the potentially positive prisoners to Level-2 (D-Unit) for separation, and if they have a fever, they get tested. They are isolated for 14 days. Further, if they are positive, they go to K-Unit. Also, if one prisoner has a fever the entire cube is evacuated, and unit porters who not certified to clean, are tasked with sanitizing the cubes with no protective equipment on.

18. Healthcare personnel now deliver meds to the unit and go back and forth between the potentially infected prisoners in (Level-2) D-Unit, and (Level-1) TA-Unit. We stand in long lines waiting for our medication. The nurses wear various masks (personal and state issue) and do not change them during each visit.

19. Prisoners are stopped and searched by officers who are reusing the same gloves.

20. JCF was Coronavirus free until MDOC Director Heidi Washington and Warden Nagy used JCF as the official location for housing infected prisoners in formerly shuttered K-Unit; now called "Korona Unit." K-Unit opened on or about March 27, 2020.

21. The first positive Covid-19 prisoner was in TB Unit and confirmed on April 9, 2020.

22. On information and belief, during each shift change corrections staff are screening body temperatures of all incoming staff. Yet, due to: a) significant understaffing precipitated by early retirements (Officers Blair, Marsh, Patino, Barron) and/or employees simply quitting out of concern of contracting Covid-19; b) low morale induced by mandatory overtime; c) a hostile work environment fostered by the inability to practice social distancing; d) lack of adequate personal protective equipment; and e) discontent induced by Warden Nagy for installing a containment unit at this facility for Covid-19 positive prisoners from other facilities, supervisory officials are skewing the temperature readings used to identify who has a fever. For instance, at least two anonymous officers recently reported to this affiant that when an officer's temperature is checked at the gate, it is common for a temperature reading of 94° or 95° as the norm. This was confirmed by personally observing another officer making a record in their

own date book which is being used as a recording system of temperature checks.

I have read the above declaration and find that it is true and accurate based on my observations and/or what staff has informed me.

I give permission to Counsel Daniel E. Manville to sign my name to this declaration due to the restriction placed on communications by prisoners with outside sources.

Date: 4/24/20 Signature: Robert Winburn signed w/ permission

DECLARATION OF DAVID LYONS, 231703

I, David Lyons, under the penalty of perjury, state the following:

1. I am currently confined within the Michigan Department of Corrections at Macomb Correctional Facility.
2. On April 11, 2020, I filed two grievances. One against Warden Willis Chapman, and the other against Director Heidi Washington. As of April 19, 2020, I have not received a response, receipt, or the identifier number for my grievances.
3. On April 16, 2020, I was moved from Housing Unit 5-26B to Housing Unit 2, cell 108B. In the new unit, I am mixed in with prisoners who are infected with COVID-19.
4. There is no cleaning supplies issued in Unit-2.
5. Laundry is not being collected or done.
6. Prison staff are most of the time not wearing masks.
7. Prisoners are forced to share facilities (toilets, showers) with those who are quarantined inside one of the day rooms.

I have read the above declaration and find that it is true and accurate based on my observations and/or what staff has informed me.

I give permission to Counsel Daniel E. Manville to sign my name to this declaration due to the restriction placed on communications by prisoners with outside sources.

Date: 2/26/20 Signature: David Lyons signed w/ permission

DAVID LYONS, 231703

Exhibit 16 - Decl. of David Lyon

Exhibit 17 - WIthdrawn

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2017 WL 3085785
Only the Westlaw citation is currently available.
United States District Court, E.D. Michigan, Southern Division.

Mary Ann MCBRIDE, et al., Plaintiffs,
v.
MICHIGAN DEPARTMENT OF CORRECTIONS, et al., Defendant.

Case No. 15-11222
|
Signed 07/20/2017

Attorneys and Law Firms

Abraham Singer, Kitch Drutchas Wagner Valitutti & Sherbrook, Detroit, MI, Andrew D. Lazerow, Megan E. Gerking, Philip J. Levitz, Stephen Curtis Bartenstein, Covington & Burling LLP, Washington, DC, Chris E. Davis, Michigan Protection and Advocacy Service, Lansing, MI, for Plaintiffs.

Allan J. Soros, James E. Long, Robert J. Jenkins, Jeanmarie Miller, State of Michigan Department of Attorney General, Gary L. Grant, Michigan Attonrey General's Office, Lansing, MI, for Defendant.

ORDER ADOPTING 6/30/17 REPORT AND RECOMMENDATION

Sean F. Cox, United States District Judge

***1** Plaintiffs filed this putative class action on March 31, 2015. The matter was referred to Magistrate Judge David R. Grand for all pretrial proceedings.

On June 30, 2017, Magistrate Judge Grand issued a Report and Recommendation ("R&R") wherein he recommends that the Court grant Plaintiffs' Motion for Class Certification. (D.E. No. 94).

The time for filing objections to the R&R has expired and the docket reflects that neither party has filed objections to the R&R. The Court hereby ADOPTS the June 30, 2017, R&R.

Exhibit 18 - McBride v. MDOC

Manville, Daniel 4/30/2020
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IT IS ORDERED that Plaintiffs' Motion for Class Certification is GRANTED and the Court hereby CERTIFIES the following class: "all deaf and hard of hearing individuals in the custody of the MDOC (whether now or in the future), who require hearing-related accommodations, including but not limited to interpreters, hearing devices, or other auxiliary aids or services, to communicate effectively and/or to access or participate in programs, services, or activities available to individuals in the custody of the MDOC."

IT IS SO ORDERED.

All Citations

Not Reported in Fed. Supp., 2017 WL 3085785

End of Document

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Exhibit 18 - McBride v. MDOC

Manville, Daniel 4/30/2020
For Educational Use Only

2012 WL 1440254
Only the Westlaw citation is currently available.
United States District Court,
S.D. Ohio,
Eastern Division.

Gerald SMITH, et al., Plaintiffs,
v.
OHIO DEPARTMENT OF REHABILITATION AND CORRECTION, et al., Defendants.

Civil Action No. 2:08–CV–15.
|
April 26, 2012.

Attorneys and Law Firms

Daniel R. Mordarski, Law Offices of Daniel R. Mordarski LLC, Amy K Schermer, Weston Hurd, Jeffrey Donnellon, Donnellon & Ezanidis LLC, John A Harris, IV, Mark Mathew Kitrick, Mark D Lewis, Columbus, OH, for Plaintiffs.

Mindy Ann Worly, Caitlyn Ann Nestleroth, Ohio Attorney General, Criminal Justice Section, Corrections Unit, Columbus, OH, for Defendants.

OPINION AND ORDER

NORAH McCANN KING, United States Magistrate Judge.

***1** This is a class action brought on behalf of inmates at the Chillicothe Correctional Institution ("CCI") in connection with alleged exposure to unabated asbestos throughout CCI. With the consent of the parties, *see* 28 U.S.C. § 636(c), and following preliminary approval of the parties' stipulated private settlement agreement and certification of a settlement class, the Court conducted an initial fairness hearing on March 13, 2012 and a reopened hearing on April 2, 2012. This matter is now before the Court for final consideration of the parties' private settlement agreement and certification of the class.

Exhibit 19 - Smith v. Ohio Dep't of Rehab. and Corr

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I. BACKGROUND

On January 4, 2008 and with the assistance of counsel, plaintiffs filed a putative class action for declaratory, injunctive and monetary relief under 42 U.S.C. § 1983, alleging that defendant prison officials have been deliberately indifferent to the welfare of CCI inmates by reason of the presence of asbestos in the institution. *Complaint,* Doc. No. 2. Plaintiffs also asserted a claim of intentional infliction of emotional distress. *Id.* On November 11, 2008, the *First Amended Complaint,* Doc. No. 18, was filed which deleted the earlier request for compensatory damages. [1]

[1] The *First Amended Complaint* included a request for nominal and punitive damages.

The Court established an initial case schedule, which was later extended, and the parties engaged in extensive discovery, including expert discovery. *See, e.g., Continued Preliminary Pretrial Order,* Doc. No. 22; *Order,* Doc. No. 37; *Order,* Doc. No. 42. On April 15, 2009, plaintiffs filed a motion to certify the class. Doc. No. 23. After that motion was fully briefed, Doc. Nos. 29 and 35, the Court stayed resolution of the motion pending settlement discussions between the parties. *Order,* Doc. No. 61; *Order,* Doc. No. 64. The Court also suspended the pretrial schedule to allow the partie to fully explore the possibility of settlement. *Order,* Doc. No. 60. For months, the parties worked toward resolution of the issues in the case and attempted to formulate a plan for asbestos remediation, which included the appointment of a prison work committee tasked with supplementing an earlier report addressing asbestos in CCI. *Id.; Order,* Doc. No. 64; *Order,* Doc. No. 69.

On March 15, 2010, after nearly a year of settlement discussions, the parties filed a joint motion to certify a class for settlement purposes. Doc. No. 73. That motion also sought leave to withdraw the earlier motion to certify and requested that the statute of limitations for all claims of the putative class members in the *First Amended Complaint* be tolled pending resolution of the joint motion to certify the settlement class. *Id.* The Honorable John D. Holschuh, to whom the case was assigned at the time, granted that motion. *Order,* Doc. No. 76.

From early 2010 into August 2010, efforts to conduct a comprehensive inspection of CCI for the presence of asbestos went forward and the parties continued to formulate proposed terms of a joint remediation plan and other terms of settlement. *Order,* Doc. No. 79; *Order,* Doc. No. 102; *Order,* Doc. No. 123. An asbestos consulting firm that had previously inspected CCI for the presence of asbestos was retained. Months were devoted to the completion of that inspection and the preparation of a report, both of which were necessary in order to formulate a remediation plan and finalize terms of proposed settlement. *See Order,* Doc. No. 123; *Order,* Doc. No. 129; *Order,* Doc. No. 132; *Order,* Doc. No. 134. After the asbestos consulting firm's inspection and report

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were completed in early 2011, the parties participated in a joint discussion with that firm in order to address questions and concerns raised by that inspection and report. *See Order,* Doc. No. 134. Although the parties made significant progress on a proposed resolution of the action, additional issues related to asbestos remediation remained unresolved. *Order,* Doc. No. 135.

***2** On March 31, 2011, the parties filed a joint motion to withdraw the earlier motion to certify a settlement class and asked the Court to continue to toll the statute of limitations period for all putative class members. Doc. No. 137. In so moving, the parties explained that any eventual settlement agreement must necessarily include a complex plan for addressing asbestos at CCI and would, in turn, define the class. *Id.* at 2. The Court granted the parties' request to withdraw the motion to certify and continued to toll the statute of limitations for all putative class members. *Order,* Doc. No. 138.

From May 2011 through November 2011, the parties continued to negotiate precise terms of a settlement agreement and class definition, utilizing information provided by the asbestos consulting firm. *Order,* Doc. No. 141; *Order,* Doc. No. 142; *Order,* Doc. No. 143; *Order,* Doc. No. 149; *Order,* Doc. No. 156; *Order,* Doc. No. 167.

On November 28, 2011, the parties agreed to final terms of settlement and sought the Court's approval of that agreement. *Joint Motion for Preliminary Approval of Proposed Class Action Settlement,* Doc. No. 170 (*"Joint Motion for Preliminary Approval"); Private Settlement Agreement,* attached thereto as Exhibit 1 (*"Private Settlement Agreement"*). The Court preliminarily approved the parties' stipulated settlement, certified a settlement class, directed that notice be given to the class and scheduled a fairness hearing. *Order Preliminarily Approving Private Settlement Agreement, Authorizing Class Notice, and Setting Fairness Hearing,* Doc. No. 172 (*"Order of Preliminary Approval"*). Notice was provided to the members of the class in compliance with the direction of the Court and Rule 23(e). *Order of Preliminary Approval,* ¶¶ 5–6; *Notice,* attached thereto. Objections to the proposed settlement were to have been filed by January 9, 2012. *Order of Preliminary Approval,* p. 1.

The initial fairness hearing, conducted pursuant to Fed.R.Civ.P. 23(e), proceeded on March 13, 2012 ("the initial hearing"). Although no members of the class appeared, objections to the proposed settlement were filed with the Court. *See* Doc. Nos. 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 188, 193, 194. At the initial hearing, counsel for the parties addressed the *Private Settlement Agreement,* the objections thereto and the factors to be considered under Fed.R.Civ.P. 23(a), (b)(2) and (e). Evidence was submitted, including the sworn testimony of the former trial attorney for defendants, Richard Cholar, Esq., and one of the attorneys for plaintiffs and the plaintiff class, Jeffrey Donnellon, Esq.

Exhibit 19 - Smith v. Ohio Dep't of Rehab. and Corr

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Additional motions and an affidavit were filed after the initial hearing was held. Doc. Nos. 192, 193, 194. The motions sought to join two individuals as class representatives and questioned the adequacy of representation by class counsel and the current class representative, Alfonsia Perry. Doc. Nos. 192, 193. The Court reopened the fairness hearing on April 2, 2012 ("the reopened hearing") and issued a writ of habeas corpus *ad prosequendum* to secure the testimony of Mr. Perry. Doc. No. 197. Following the reopened hearing, defendants expressed their continued agreement with the joint motion to certify a settlement class and request that the Court approve the *Private Settlement Agreement. Defendants' Unopposed Clarification of Facts,* Doc. No. 199. [2]

2 More specifically, defendants' clarification addresses Mr. Perry's testimony at the reopened hearing relating to privileged housing and protective control. *Id.*

***3** The issues of class certification and whether the *Private Settlement Agreement* is fair, adequate and reasonable will be addressed in turn.

II. FINAL CERTIFICATION OF THE SETTLEMENT CLASS

The parties ask that the Court certify a class consisting of all inmates in areas identified as containing unabated asbestos at CCI ("the Class"). *Private Settlement Agreement,* ¶ 3. Rule 23 of the Federal Rules of Civil Procedure governs class actions. "To obtain class certification, a claimant must satisfy two sets of requirements: (1) each of the four prerequisites under Rule 23(a), and (2) the prerequisites of one of the three types of class actions provided for by Rule 23(b). A failure on either front dooms the class." *Pilgrim v. Universal Health Card, LLC,* 660 F.3d 943, 945–46 (6th Cir.2011).

A. Factors Under Fed.R.Civ.P. 23(a)

Rule 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;

Exhibit 19 - Smith v. Ohio Dep't of Rehab. and Corr

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(3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and

(4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a). *See also* *Coleman v. General Motors Acceptance Corp.*, 296 F.3d 443, 446 (6th Cir.2002) ("In order to obtain class certification, plaintiff must first satisfy Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy of representation."). The trial court may certify a class only if, "after a rigorous analysis," these prerequisites have been satisfied. *Alkire v. Irving,* 330 F.3d 802, 820 (6th Cir.2003) (quoting *Gen. Tel. Co. v. Falcon,* 457 U.S. 147, 161, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982) (internal quotation marks omitted)). Although a trial court has broad discretion in the certification process, the court must nevertheless exercise that discretion within the framework of Rule 23. *In re American Medical ys.,* 75 F.3d 1069, 1079 (6th Cir.1996).

1. Numerosity

Rule 23(a) first requires that "the class [be] so numerous that joinder of all members is impracticable[.]" Fed.R.Civ.P. 23(a) (1). This determination does not establish a strict numerical test and a showing of a "substantial" number of class members usually satisfies the requirement. *In re American Medical Sys.,* 75 F.3d at 1079; *Daffin v. Ford Motor Co.,* 458 F.3d 549, 552 (6th Cir.2006). *See also* *Bacon v. Honda of Am. Mfg.,* 370 F.3d 565, 570 (6th Cir.2004) ("However, sheer number of potential litigants in a class, especially if it is more than several hundred, can be the only factor needed to satisfy Rule 23(a)(1).").

Here, the parties contend that the numerosity element is met. Former lead defense counsel Richard Cholar testified at the initial hearing that there are approximately 2600 inmates currently housed at CCI. Of course, this number does not include future CCI inmates who may also be exposed to asbestos. The Court finds that this class size is sufficiently numerous that joinder of all members is impracticable. *See, e.g.,* *Bacon,* 370 F.3d at 570; *Wess v. Storey,* No. 2:08–cv–623, 2011 U.S. Dist. LEXIS 41050, at *17, 2011 WL 1463609 (S.D. Ohio April 14, 2011) (finding that a putative class of 220 members satisfied Rule 23(a)(1)'s numerosity requirement); *Salvagne v. Fairfield Ford, Inc.,* 264 F.R.D. 321, 325–26 (S.D.Ohio 2009) (concluding that a class of 375 members with a subclass of at least 90 members satisfied this element).

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2. Commonality

***4** The second requirement under Rule 23(a) is that the class share at least one common question of law or fact "the resolution of which will advance the litigation." Fed.R.Civ.P. 23(a)(2); *Alkire,* 330 F.3d at 820. Merely because questions unique to individual class members may remain does not necessarily preclude a finding that the commonality requirement has been satisfied. *Bovee v. Coopers & Lybrand,* 216 F.R.D. 596, 608 (S.D.Ohio 2003).

The parties contend that the putative class shares common questions of law and fact. This Court agrees. For example, determining whether CCI has deliberately exposed the class to dangerously high levels of unabated, exposed and/or friable asbestos, *see, First Amended Complaint,* ¶ 72(B), is a material question common to all members of the Class. Other common questions include:

1. Whether CCI has knowingly created unreasonable risks of serious damage to the present and future health of the Class in violation of the Eighth and Fourteenth Amendments to the United States;

2. Whether CCI has knowingly required inmates to abate exposed and/or friable asbestos without proper training, containment or personal protective clothing, masks and/or equipment, thereby exposing the inmates to dangerously high levels of asbestos;

3. Whether CCI failed to implement policies or procedures that would have prevented these unreasonable risks of serious damage to inmates' future health and/or failed to follow existing policies or procedures to prevent such well known risks of harm;

4. Whether injunctive and/or declaratory relief will remedy or alleviate CCI's alleged ongoing class wide constitutional violations.

First Amended Complaint, ¶ 72(B). The Court concludes that all these questions, which are common to all members of the Class, require an intensive factual inquiry and in-depth legal analysis that will be most efficiently resolved in the context of a class action.

3. Typicality

Rule 23(a) also requires that the claims of the class representative be typical of the claims and defenses of the class. Fed.R.Civ.P. 23(a)(3). A "typical" claim "arises from the same event or practice or course of conduct that gives rise to the claims of other class members, and [must be]based on the same legal theory." *Beattie v. CenturyTel, Inc.,* 511 F.3d 554, 561 (6th Cir.2007)

Exhibit 19 - Smith v. Ohio Dep't of Rehab. and Corr

Manville, Daniel 4/30/2020
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(quoting *American Med. Sys.*, 75 F.3d at 1082) (internal quotation marks omitted). However, "a representative's claim need not always involve the same facts or law, provided there is a common element of fact or law." *Id.* (quoting *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 525 n. 31 (6th Cir.1976) (internal quotation marks omitted)). "Typicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." *Sprague v. GMC*, 133 F.3d 388, 399 (1998).

***5** Here, the class representative, Alfonsia Perry, is currently incarcerated at CCI. *Unopposed Motion to Substitute Class Representative,* Doc. No. 147; *Order,* Doc. No. 148; *Transcript of Reopened Fairness Hearing ("Transcript"),* p. 8. Mr. Perry has lived at CCI for more than ten years and expects to remain there. *Transcript,* pp. 8, 10, 36. As a long-term CCI inmate, Mr. Perry's interests arise from the same events, practice or course of conduct that give rise to the claims of the Class, namely, the alleged presence of asbestos in the prison facility. Mr. Perry, who testified at the reopened hearing, shares with the Class an interest in ensuring that asbestos is properly contained or removed from CCI:

Q: Why did you get involved in this case?

A: Again, friends was dying. It's personal to me, because I'm doing an extended sentence to where I'm stuck at Chillicothe. And if I'm to live there, I want it cleaned up.

Q: Do you have an understanding that, as class representative, you bring the case for everyone else that had the same thing happen to them?

A: Yes, sir.

* * * *

Q: What do you believe that this lawsuit is accomplishing, aside from putting money in inmates' pockets?

A: It's really about cleaning up Chillicothe from its hazardous containment there. Chillicothe is filthy.

Q: You want asbestos at Chillicothe cleaned up?

A: Yes, I do.

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Q: You don't want inmates exposed to that?

A: No,—

Q: Do you—go ahead.

A: —because, early on, I said-like I was trying to explain, so many of my friends have died down there behind these, the diseases. And the truth is not getting out there as to why they're dying. And I believe there's a health risk.

Q: You believe they're exposed to a lot of contaminants, and asbestos is one of them?

A: Yes, sir.

Q: Do you explain to other inmates what the private settlement agreement does?

A: Yes.

Transcript, pp. 10, 17. The Court is satisfied that the typicality prerequisite is met.

4. Adequacy

The final prerequisite under Rule 23(a) guarantees that the class representative "will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). This inquiry is two-pronged: "1) the representative must have common interests with unnamed members of the class, and 2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *In re American Medical Sys.,* 75 F.3d at 1083 (quoting *Senter,* 532 F.2d at 525 (internal quotation marks omitted)). The Court concludes that both prongs have been met.

a. Adequacy of Mr. Perry as class representative

First, no conflicts of interest exist between Mr. Perry and the putative class. As discussed *supra,* Mr. Perry shares with the Class the common interest in safely comtaining and removing asbestos from CCI.

Second, Mr. Perry has demonstrated that he has pursued and will continue to vigorously pursue the interests of the Class throughout this litigation. As an initial matter, Mr. Perry has been involved in this matter since 2007, predating the filing of this action, and he was one of the named plaintiffs in the original *Complaint. Transcript,* pp. 9–10. Before being named a class representative, Mr. Perry communicated with plaintiffs' counsel about this action:

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***6** Q: I want to talk for a minute about your duties as class representative. Prior to becoming class representative, did you have communication with my office?

A: Yes, sir.

Q: Explain that to the Court.

A: Well, I've written you several letters trying to show my support in this lawsuit. I've spent my own monies trying to do the best I can for everybody concerned in this matter.

Q: Were you one of the named plaintiffs on the original complaint that was filed in this case?

A: Yes, sir.

Q: And did you mail to my office information about asbestos at the prison?

A: Yes, sir.

Q: Prior to becoming class representative, the letters you sent to my office, did you receive any responses from my office?

A: Yes, sir.

Q: Did you receive information about the lawsuit?

A: Yes, sir.

Id. at 10–11.

Mr. Perry became the class representative in this case on August 8, 2011. *Order,* Doc. No. 149. [3] During the reopened hearing, Mr. Perry explained that other inmates had asked him to become the class representative and inmates contacted plaintiffs' counsel to nominate Mr. Perry. *Transcript,* p. 11.

[3] Mr. Perry replaced Jack Frederick, who was transferred out of CCI, as class representative. *Id.;* Doc. No. 147. During the initial hearing, class counsel advised the Court that the first named class representative, Gerald Smith, was released from prison and later died.

As class representative, Mr. Perry continued to raise questions regarding the litigation, to communicate with class counsel and to receive information from counsel, including Court filings

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and letters. *Id.* at 11–12. When he receives information from counsel, Mr. Perry spends his own money to make copies of documents and shares information with the Class:

Q: I want you to explain to the Court what you do when you receive something from my office?

A: Okay. When I receive something from your office, I take them, and I go copy them. I make about ten to fifteen copies, and I share them copies with guys from every dorm. So, I make sure that every dorm would have that information, and I make sure that I spend my own monies to do so, because some guys can't afford copies. So, I make sure I have extra copies for them.

Q: Does someone have to ask you to do that?

A: No.

Q: Do you do that every time I send you something?

A: Yes.

Q: And you make sure that someone in each dorm gets a copy?

A: Yes.

Q: And explain to the Court what happens with those copies after you distribute them.

A: Many guys take them, and they will make copies of them copies, and we would more or less just circulate them throughout the prison. And if there is any questions then that they would come to me or we would have group meetings, and I would discuss the documents with them.

Q: Do inmates ever come to you and ask you for documents from the case?

A: Yes.

Q: Explain to the Court what you do when that happens.

A: I have extra copies. I make extra copies, and I make sure that they understand what that document was and what—what we were looking forward to that's next as far as a hearing or whatever.

Q: Have you ever refused anyone copies if they asked you?

*7 A: No.

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Id. at 12–14.

Q: I believe you testified that there were 12 dorms at CCI; is that correct?

A: I think—I'm just thinking 12 dorms. It's more buildings, but I was just talking about the dormitories.

Q: Am I correct in the understanding that you had helpers at each of those dorms to help disseminate information?

A: Yes, ma'am. What I done was, I chose a guy from each dorm that, whenever information come in, we would all meet together at the yard, since we don't have no place to meet at. So, we'd meet at the yard, at the tables, and I'd make copies, and I'd give a copy of it, and then we would—I would sit down, and we would discuss that information so everybody can go back to their dorms and explain what the motion is, who wants copies or whatever.

Id. at 49–50.

In addition to providing copies of documents, Mr. Perry routinely answers questions from other inmates about this litigation:

Q: ... Are you frequently confronted by other inmates with questions about this case?

A: All the time.

Q: Tell the Court about that.

A: Well, I'm always stopped and asked about what's going on, where the case is, how is it headed. And I try to explain, the best that I can, about what's going on.

Q: Are you up front with other inmates about the case?

A: All the time.

Id. at 15. *See also id.* at 36.

Mr. Perry testified that one of the documents he received, distributed and discussed was the *Private Settlement Agreement*. *Id.* at 19–20. Mr. Perry met with class counsel to go over all of the provisions of the *Private Settlement Agreement* so that he could understand and explain the agreement to other inmates:

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Q: Let's talk about the private settlement agreement. Did you receive a copy of it?

A: Yes, sir.

Q: I mailed you a copy?

A: Yes, sir.

Q: Did I come to CCI to meet with you to go over it?

A: Every page.

Q: Explain that to the Court. What did we do?

A: Well, we came—you came to the prison, and we went page by page, because you wanted to make sure that I understood so I could explain things to the inmates on the grounds. I've made copies of it.

Q: When I was there and we went over the private settlement agreement, how long was I there?

A: Two plus hours.

Q: Were there any questions that you had that I didn't answer?

A: No.

Q: Do you want the Court to approve the private settlement agreement?

A: Yes.

Q: And I think I've asked you this already, but what do you believe the private settlement agreement will accomplish?

A: I'm praying that it will clean up Chillicothe. That's my biggest issue.

Q: Clean up asbestos at Chillicothe?

A: Asbestos, yeah. It's terrible there.

Id.

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Prior to the initial hearing, Mr. Perry filed an objection to the *Private Settlement Agreement,* expressing concern that the terms were unfair for several different reasons. Doc. No. 185. However, after he filed that document, class counsel met again with Mr. Perry to ask him about those concerns. Mr. Donnellon testified that he met with Mr. Perry for more than an hour and learned that Mr. Perry did not intend, by filing that objection, to derail the settlement process. Rather, according to Mr. Donnellon, Mr. Perry now understands that certain provisions in the *Private Settlement Agreement* permit him and the other inmates to file a claim in state court to enforce the terms of the *Private Settlement Agreement.* Acting on behalf of Mr. Perry, Mr. Donnellon thereafter filed a notice to withdraw Mr. Perry's objection. Doc. No. 186. [4]

4 The Court took that issue under advisement at the initial hearing. *See* Fed.R.Civ.P. 23(e)(5) ("... the objection may be withdrawn only with the court's approval").

***8** Mr. Perry's testimony at the reopened hearing supports counsel's testimony in this regard and supports Mr. Perry's repudiation of his objection. Specifically, Mr. Perry testified that he believes that the *Private Settlement Agreement* is fair and adequate and that it provides an appropriate remedy should prison officials not comply with their obligations under the agreement:

> THE COURT: Now, you testified that you believe that the private settlement agreement is fair and adequate and reasonable.
>
> ALFONSIA PERRY: Yes, ma'am.
>
> THE COURT: And do you want the Court to approve that?
>
> THE WITNESS: Yes, ma'am. And the reason is because, again, CCI needs cleaned up, but it gives us some type of backing in case CCI do not clean it up, that we've got other avenues to come back into the court to either sue them personally, individually, or to raise them issues back with this Court that they're not doing what they said they was going to do, because I don't believe they'll do it.

Id. at 49. *See also id.* at 20, 47 (confirming that Mr. Perry wants the Court to approve the *Private Settlement Agreement,* which he believes is fair, adequate and reasonable).

When Mr. Perry explains the details of the *Private Settlement Agreement* to other inmates, some inmates are upset to learn that the *Private Settlement Agreement* does not include the payment of monetary damages to members of the Class. *Id.* at 15–18. In addressing concerns about the *Private Settlement Agreement,* Mr. Perry explains to these inmates that they are free to file their own lawsuit for money damages:

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Q: What about inmates that are upset they won't be getting money damages in this lawsuit?

A: They—

Q: Do you ever tell them anything?

A: Well, I've tried to address that. But if somebody don't want to hear something, they just don't want to hear. I give them the basics on what to do and how to do it, and, if they're not satisfied, they could file their own lawsuit.

Q: Have you ever explained that to other inmates: that the private settlement agreement gives them the right to file their own lawsuit, tolls the statute of limitations?

A: Yes.

Id. at 19–20.

In addressing the specific concern that prison officials will not comply with their obligations under the *Private Settlement Agreement,* Mr. Perry now explains to the inmates that the Class has recourse under those circumstances:

Q: Are some inmates concerned that CCI won't follow through on the agreement?

A: Yes, and I'm one of them.

Q: Are some inmates concerned that, all the areas that it's been agreed that asbestos will be removed, that maybe that won't happen?

A: Yes.

Q: Do you have that conversation with other inmates?

A: All the time.

Q: What do you tell them about that? What does the private settlement agreement do to address that?

A: The private settlement agreement is to address the fact that, if CCI do not keep up with their part of the bargain, that they could file individual lawsuits.

***9** Q: Who could?

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A: Anybody that's at CCI, any inmate.

Q: Any inmate?

A: Any inmate.

Q: Do you explain that to other inmates?

A: Yes.

Q: Is that a frequent conversation you have?

A: Yes. That's the biggest conversation I have.

Id. at 18–19.

Mr. Perry's experience as the representative of the Class has not been easy:

Q: Because of this lawsuit, do you deal with inmates you ormally wouldn't deal with?

A: All the time.

Q: Does that create problems for you?

A: Yes, and—yes.

Q: Tell the Court about that.

A: I explain this case probably, give or take, 30, 40, times a day to different guys, some people who dislike me, some people who are prejudiced, but they send other guys to me to see where this case is going. And I explain to them what's what. And there's always attitude because they think that I'm not coming forward enough about what's going on.

Id. at 17–18.

On March 14, 2012, after the initial hearing and more than two months after the date by which objections to the *Private Settlement Agreement* were due, two documents, signed by Mr. Perry, were filed with the Court. These documents call into question the adequacy of Mr. Perry as a class representative, of class counsel's representation and the of *Private Settlement Agreement. See* Doc. Nos. 192, 193. More specifically, Mr. Perry signed both pages of a two-page document entitled

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Motion to Intervene By Inclusion of Multiple Class Representatives Pursuant to Rule 23(d)(1), (B)(C) & (2) Federal Rules Of Civil Procedure, Doc. No. 192 (*"Motion for Multiple Class Representatives"*).[5] Two other CCI inmates, Michael Roberts and Jerome Royster, also signed this document which asks that Mr. Roberts and Mr. Royster be added as class representatives. *Id.* 1–2. As an initial matter, the *Motion for Multiple Class Representatives* does not address the untimeliness of the motion, nor does the motion complain either that the notice to the Class was inadequate or that the movants lacked sufficient time in which to file objections. The Court therefore has no obligation to consider this untimely motion. *Cf. UAW v. Gen'l Motors Corp.,* 497 F.3d 615, 636 (6th Cir.2007) (noting that the district court has "traditionally broad discretion over the evidence it considers when reviewing a proposed class action settlement").

[5] Doc. No. 193, relating to the adequacy of class counsel, will be addressed *infra.*

However, even considering the merits of the *Motion for Multiple Class Representatives,* that motion does not persuade this Court that additional class representatives are needed and/or that Mr. Perry is an inadequate class representative. The "Memorandum in Support" appearing on page two of the *Motion for Multiple Class Representatives* advances three reasons to add Mr. Royster and Mr. Roberts as class representatives: (1) Mr. Perry's "transitory conditions" (presumably referring to the possibility that Mr. Perry, like any inmate, might be transferred to another prison); (2) Mr. Perry's "oratory impediment" and (3) having only one class representative for "approximately" 3,000 CCI inmates is unfair and/or prejudicial. *Id.* at 2. Significantly, however, Mr. Perry testified that the "Memorandum In Support" was not printed on the second page at the time that he signed the *Motion for Multiple Class Representatives* and that he would not have signed the document had he seen this text:

***10** Q: And you see on the second page, where I'm pointing here, at the top, it says: PAGEID # : 822?

A: Yes.

Q: Okay. I'm going to ask you a few questions about this document, Mr. Perry. I want to start by asking you a couple of questions about the second page,—

A: Okay.

Q: —the page with the "Memorandum in Support" at the top.

A: Okay.

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Q: When you signed the second page, I want you to explain to the Court what was on this document.

A: Okay. When we did this second motion, here, the only thing that was on this page was the "Wherefore" and the end. There was no memorandum in support ever there.

Q: And I just want to clarify—I think we understand what you're saying, but just to make sure, you're saying, the first half of this page, where it says "Memorandum in Support" and all the text beneath that, up until where we get to where it says "Wherefore" was not on this document when you signed it?

A: No, it wasn't. May I explain something?

Q: Sure.

A: When we do motions as pro se, this is how we—we would do the front. Excuse me. And we would end it at the bottom with the "Wherefore" and close off. So, the "Wherefore" would be —the "Wherefore" would be on the bottom, and that would conclude that motion. But there wasn't nothing written prior to that.

Q: When is the first time you read the memorandum in support part of that document?

A: The date you brought it down to the jail.

Q: Had you see that—

THE COURT: Can I interrupt? To the jail or CCI?

THE WITNESS: I mean CCI.

THE COURT: Okay.

BY MR. DONNELLON:

Q: Had you seen that prior to it being filed?

A: No, sir. I want to make sure that the Court understands that, had I have seen these prior to it, they never would have got filed the way they did. These were filed, and I—I don't even have a copy of them.

Id. at 27–28.

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Mr. Perry testified that he was upset when he learned that the "Memorandum in Support" had been added and filed without his consent, pointing out that the additional text even misspelled Mr. Perry's name:

Q: How did you feel when you learned that information with that document, without your knowledge, had been filed?

A: I was upset with that, too. And I wanted to clarify, too, that this document here (indicating), even the spelling of my name should let the Court know that I didn't see it, because he's got my name spelled A–L–FO–N–Z–O.

Id. at 28. *See also id.* at 53–54 (class counsel Mr. Donnellon testifying regarding Mr. Perry's reaction when meeting with Mr. Perry to review Doc. Nos. 192 and 193 for the first time).

Mr. Perry went on to explain that, at the time he signed the *Motion for Multiple Class Representatives,* he believed that adding Mr. Roberts and Mr. Royster as "co-reps" simply meant that these inmates would help Mr. Perry, who previously resided in the E–2 dorm, distribute information to Class members residing in CCI's D dorm:

***11** Q: When you signed this paperwork [Doc. Nos. 192 and 193], did you believe that this was for two separate motions, or for one motion?

A: One motion. What I thought, we believed, was that these were only to be co-reps for me at the prison. That's all.

* * * *

Q: You were approached by some inmates in the D dorm—

A: Yes.

Q: —prior to signing these documents?

A: Yes.

Q: And they wanted to be added to this case as co-reps?

A: Yes.

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Q: Explain to the Court your understanding of that. What would a co-rep be?

A: Okay. A co-rep would be someone, if I couldn't make it out, as far as—as my understanding, that they would be able to either go in my place or, if I was busy or caught up in a class or something, that they could go out and meet with the attorneys, and we would all share that information again.

* * * *

Q: So, you were approached by some inmates. They asked you to sign your name on a document, correct?

A: Yes. Yeah. After we had discussed the co-rep part, just being co-reps; and just, more so, they were supposed to help me in areas to where I couldn't go, like D dorm two and three. You've got to have permission to go to different dorms or whatever. And that's how we was going to spread information.

Q: But at the time you signed that, your understanding is that you would still be the main class representative?

A: Yes.

Id. at 29–30. *See also id.* at 31–32.

Q: When you were approached by Mr. Roberts and Mr. Royster, when those documents [Doc. Nos. 192 and 193] were signed, you're listed as class representative, correct?

A: Yes, sir.

Q: And they're listed as co-class representatives, correct?

A: Yes.

Q: Was your understanding that they would simply serve the D dorm?

A: Yes.

Q: Explain that to the Court.

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A: D dorm's got five dorms in there. And there is steps in each dorm that every inmate —you can't go from one up to two without permission to go. Everybody got—you've got to ask permission to go. So, with me giving information out, everybody would have documents to tell everybody in their dorms. Now there is about 12 different dorms in our institution. And, some dorms, I can go in, you know, depending on the officer, to share information with. Some, I can't.

Id. at 33–34. Mr. Perry explained that he agreed to sign the motion in order to ease the burden of distributing information to the members of the Class at CCI. *Id.* at 31, 34–35. Mr. Perry emphasized that his initial approval of Mr. Roberts and Mr. Royster serving as co-representatives changed after Mr. Perry saw the "Memorandum in Support." *Id.* at 32–33.

Notwithstanding the pressures of serving as class representative, Mr. Perry confirmed that he wants to continue to serve in that capacity, explaining that "a lot of" inmates trust him. *Id.* at 30, 36–37. Mr. Perry went on to explain that he enjoys a good relationship with other inmates and that a new class representative would face more pressures and difficulties than those that Mr. Perry currently experiences:

***12** Q: If the Court were to not approve you as class representative and we had to find a new class representative, what kind of pressures would that inmate face?

A: Probably more worse than mine, because I've got a good—I've got a good rapport with a majority of guys, because they know me and they know how I am. They know—they know that I'm about business and I try to treat everybody right.

Q: Would an inmate who has been at CCI for a short period of time make a good class representative?

A: That's a hard question to ask, but I would say no.

Q: Do you think a new class representative would face more pressures than you do?

A: Probably.

Q: Explain that to the Court.

A: I've been used to the process of CCI and how inmates think down there, and I don't let too much sway me from doing what I have to do as a representative. And I can't really speak on someone else, but I don't think that they would be able to deal with the pressure or to share the information that is given the way I do.

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Q: Is it possible that a new class representative could face violence from other prisoners?

A: Sure.

Id. at 37–38. Finally, Mr. Perry testified that his actions and opinions are not influenced by promises or threats:

THE COURT:

Q: Do you feel at all pressured or coerced in your testimony here today? Did anyone threaten you or promise you anything to testify about anything you've testified to here today?

A: No, ma'am.

Q: Has anybody made you any promises that you'll get some benefit if you testify in a certain way here today?

A: No, sir.

Q: Has anyone threatened you that you would suffer harm or punishment if you testified differently than you've testified here today?

A: No, ma'am. I'm doing this, again, and I'm telling the truth in this case because so many of my friends, since I've been incarcerated, have died from diseases at that institution. And I'm going to stand up for them and for the guys who is sick now. I'm sick now, I believe, but we can't get the adequate medical attention that we're supposed to have. Okay? And I just wanted to be able to set the record straight as far as the importance of me being the dorm rep here and that I do whatever counsel tells me to do and what this Court tells me to do and, more so, what inmates ask of me to do when it comes to me asking questions to our counsel about things that's going on.

Id. at 47–49. *See also id.* at 35 (denying that class counsel promised him anything beyond the settlement terms that apply to all inmates).

Considering all this evidence, the Court concludes that Mr. Perry is an adequate class representative because he shares common interests with the Class and will vigorously prosecute the interests of the Class. In reaching this conclusion, the Court credits Mr. Perry's testimony that, at the time he signed the *Motion for Multiple Class Representatives,* he was unaware of and did not agree to all the language contained in that document at the time it was filed. Moreover, none of the three proffered reasons in the *Motion for Multiple Class Representatives* persuades this Court that additional class

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representatives are necessary. First, addressing the allegation of Mr. Perry's "transitory conditions," there is nothing in the record that suggests that Mr. Perry will be transferred from CCI. In fact, Mr. Perry testified that he is serving an "extended sentence" at CCI. *Transcript,* p. 10. Second, contrary to the suggestion that Mr. Perry suffers from an "oratory impediment," the Court found Mr. Perry to be an articulate witness who had no difficulty answering questions and expressing his thoughts during the reopened hearing. Third, there is nothing before the Court to suggest that additional class representatives are needed simply because there are "approximately" 3000 CCI inmates in the Class. Mr. Perry explained at length the procedure followed by him in disseminating information, which includes providing copies to inmates from other dorms who in turn further distribute information. Moreover, other filings by Mr. Roberts and Mr. Royster suggest that the primary interest of these inmates may be the recovery of money rather than the safe removal of asbestos from CCI. *See* Doc. No. 95 (Mr. Royster's objection to the withdrawal of the claim for damages);[6] Doc. No. 183 (Mr. Roberts's objection complaining, *inter alia,* that the *Private Settlement Agreement* provides only injunctive relief and not monetary damages).[7] Conversely, Mr. Perry's credible testimony underscores the conclusion that he is genuinely concerned with achieving a safe environment for all inmates at CCI. In sum, Mr. Perry is an articulate and effective class representative who will vigorously represent the interests of the Class.

6 The Court previously overruled this objection, concluding that the class members' "rights to pursue nominal and punitive damages have been adequately preserved by this Court's tolling of the statute of limitations and according to the parties, will continue to be preserved by the proposed settlement agreement." *Memorandum Opinion and Order,* Doc. No. 125, p. 6.

7 Mr. Roberts's objection, as well as other inmates' objections, will be addressed *infra.*

b. Adequacy of class counsel

***13** In addition, the Court is satisfied that class counsel is qualified and has vigorously represented the interests of the class. More specifically, class counsel has substantial experience with class actions and civil rights litigation. *See* Plaintiff's Exhibit 1, attached to *Minute Entry,* Doc. No. 191, pp. 5–10. In addition, one of the class counsel, Mr. Donnellon, testified at the initial hearing regarding his regular contact with class representatives during the course of this litigation.

On March 14, 2012, following the initial hearing, a document entitled *Motion for Signifying Lack of Fair and Adequate Representation Pursuant Rule 23(d)(1)(B)(iii) Federal Rules of Civil Procedure,* Doc. No. 193 ("Motion Regarding Adequacy of Class Counsel"), was filed.[8] This document, which appears to be signed on page one by Messrs. Perry, Roberts and Royster, questions the adequacy of class counsel. *Id.* at 1–2. More specifically, the

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"Memorandum in Support" appearing on page two of the Motion Regarding Adequacy of Class Counsel complains of inadequate representation in four respects: (1) class counsel has failed to include the class representative "in any real meaningful discussion" about the proposed *Private Settlement Agreement;* (2) class counsel's "lack of communication;" (3) class counsel's "lack of fiduciary duty" to class members' claims for monetary damages; and (4) "failure to hold ODRC accountable[.]" *Id.* at 2. Only the signature of Mr. Roberts appears on page two below the "Memorandum in Support." *Id.*

8 As was the *Motion for Multiple Class Representatives,* the *Motion Regarding Adequacy of Class Counsel* was filed more than two months after the deadline for filing objections had passed. The *Motion Regarding Adequacy of Class Counsel* does not complain that notice to the Class was untimely or that there was inadequate time to file objections. Although this motion is therefore untimely and the Court need not consider it, *cf.* *Gen'l Motors Corp,* 497 F.3d at 636, the Court will nevertheless address the merits of the motion.

The *Motion Regarding Adequacy of Class Counsel* does not alter this Court's conclusion that class counsel is qualified and will continue to vigorously represent the interests of the Class.[9] As with the *Motion for Multiple Class Representatives,* Mr. Perry testified that the "Memorandum in Support" was not part of the motion when he signed the document and that he disagrees with the assertion that class counsel is inadequate:

9 The other criticism raised in the *Motion Regarding Adequacy of Class Counsel,* which relates to complaints that the *Private Settlement Agreement* does not contain a claim for monetary damages or a provision to "hold ODRC accountable," will be addressed *infra.*

Q: When is the first time you saw page 2 of that document [Doc. No. 193]?

A: The day you brought it to the court. I mean to the jail.

Q: The day I brought it—

A: Yes.

Q: —to CCI?

A: Yes.

Q: Did you see page 2 of that document prior to it being filed?

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A: No.

Q: Who signed page 2 of that document?

A: Mr. Roberts.

Q: Do you agree with anything that's on the second page of that document?

A: No, I don't.

Q: The second page of that document states that the counsel in this case are inadequate and that they've breached their fiduciary duties. Do you agree with that?

A: No.

Q: What is your opinion of the attorneys that have represented the plaintiffs in this case?

A: Thank you for asking that question. You all have worked hard on this case for years. And I didn't appreciate seeing this document. And when I seen it, because it wasn't present as part of what I had intended and what I meant by getting the co-representatives, I didn't then, I didn't now, want to make this Court know that you all was ineffective, or whatever this document means.

***14** *Id.* at 23–24. Mr. Perry corroborated the testimony of Mr. Donnellon that counsel maintained routine contact through letters and personal visits to CCI, provided copies of filings and responded to all of Mr. Perry's questions. *Id.* at 10–12, 14–15, 19–20.

Considering all this evidence, the Court concludes that class counsel is qualified, has competently represented and will continue to vigorously represent the interests of the Class. The Court finds that Mr. Perry, the class representative, does not agree with the suggestion made in the "Memorandum in Support" that counsel's representation of the Class has been in any respect inadequate. Moreover, Mr. Perry's testimony establishes that class counsel maintained meaningful communication and that the in-person meetings at CCI to discuss aspects of this litigation were detailed and never rushed. For example, as discussed *supra,* Mr. Donnellon met with Mr. Perry for more than two hours in order to explain each page of the *Private Settlement Agreement,* which Mr. Perry believes is fair, adequate and reasonable. *Transcript,* pp. 19–20, 49.

Finally, the Court notes that another inmate and former class representative, Jack Frederick, also filed an objection alleging, *inter alia,* that class counsel has colluded with the defendants and has failed to vigorously represent the interests of the Class. Doc. No. 188, p. 1 (citing to Doc. No. 116–

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1) and Exhibit (a letter dated July 2, 2010 signed by Mr. Donnellon) attached thereto. However, Mr. Frederick lacks standing to object because he is no longer incarcerated at CCI and is therefore not a member of the Class. *Id.* at 2–3 (providing an address at Pickaway Correctional Institution in Orient, Ohio). Moreover, Mr. Frederick's objection was filed on February 28, 2012, i.e., more than seven weeks after the January 9, 2012 deadline for filing objections, and is therefore untimely. *See, e.g., In re: Veritas Software Corp. Sec. Litigation,* No.08–3627, 396 Fed. Appx. 815 (3rd Cir. Oct.4, 2010) (finding no abuse of discretion in district court's conclusion that an objection was untimely when it was filed more than four weeks after the deadline provided in the notice to the class). As discussed *supra,* the *Notice* was distributed and posted in compliance with the direction of the Court and provided approximately 30 days for members to file objections. Nowhere in his objection does Mr. Frederick complain that the *Notice* was inadequate or that he had insufficient time in which to file an objection. The Court therefore has no obligation to consider Mr. Frederick's untimely objection. *Cf. Gen'l Motors Corp.,* 497 F.3d at 636.

In any event, nothing in Mr. Frederick's objection establishes that class counsel's representation is inadequate. Mr. Frederick generally alleges that class counsel is "indeed in collusion with the Defendants to cheat the Plaintiffs out of their damage awards[.]" Doc. No. 188, p. 1. However, the *Private Settlement Agreement* preserves each class member's claim for monetary relief, which means that any class member may file a lawsuit to recover compensatory or other damages. *See Private Settlement Agreement,* ¶ 6(C). In addition, contrary to Mr. Frederick's assertions, the letter dated July 2, 2010 signed by Mr. Donnellon, Exhibit attached to Doc. No. 188, does not establish that class counsel "coerced" Mr. Frederick into signing an affidavit dated July 7, 2010, Doc. No. 116–1. [10] Counsel's letter simply explained to Mr. Frederick that it is impossible for class counsel to satisfy all the demands of individual inmates. The letter also recognized the real possibility that the class allegations could be dismissed should it be determined that either class counsel or the class representative is inadequate. Doc. No. 116–1. Mr. Frederick offers no evidence that class counsel coerced him into signing an affidavit or that counsel otherwise failed to vigorously represent the interests of the Class. Under these circumstances, the Court is therefore satisfied that the adequacy requirement, as well as the other requirements under Rule 23(a), have been met.

10 This affidavit was offered in support of plaintiffs' memorandum in opposition to objections complaining of the Court's order granting leave to withdraw the original motion to certify and claim for damages, Doc. No. 23. Doc. No. 116 (citing *Order,* Doc. No. 76).

B. Factors Under Fed.R.Civ.P. 23(b)

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***15** In addition to the requirements of Rule 23(a), a party seeking certification must show that the class action is maintainable under one of the three subsections of Rule 23(b). *Pilgrim,* 660 F.3d at 945. Here, the parties contend that this action is properly maintained under Rule 23(b)(2), which provides that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole[.]"

This Court concludes that certification under Rule 23(b)(2) is appropriate because plaintiffs' claims are based on conduct (or inaction) by defendants that is generally applicable to the Class. Specifically, the presence of asbestos at CCI, and defendants' response thereto, are generally applicable to the entire proposed Class, who are incarcerated at that facility. Injunctive relief, *i.e.,* the proper maintenance and/or removal of the asbestos at CCI in accordance with applicable laws and safeguards, is therefore appropriate with respect to the Class as a whole. Moreover, courts in this district have previously certified class actions under Rule 23(b)(2) arising from alleged prison conditions that affect the inmate population as a whole. *See, e.g., In re Southern Ohio Correctional Facility,* 173 F.R.D. 205 (S.D.Ohio 1997) (certifying class under Rule 23(b)(2) based on claims arising from defendants' actions or inaction during a riot at a maximum security prison in Lucasville, Ohio and arising from prison conditions following that riot). *Cf. Hiatt v. County of Adams,* 155 F.R.D. 605 (S.D.Ohio 1994) (challenging conditions of confinement for pretrial detainees).

For all the foregoing reasons, the Court concludes that certification of the action as a class action under Fed.R.Civ.P. 23(b)(2) is appropriate. The Court therefore **CERTIFIES** a class of plaintiffs consisting of "[a]ll inmates in areas identified as containing unabated asbestos at CCI." *Private Settlement Agreement,* ¶ 3.

III. FINAL APPROVAL OF THE *PRIVATE SETTLEMENT AGREEMENT*

Rule 23(e) governs settlements of class actions and imposes procedural safeguards that must be followed: the parties must file a statement identifying the proposed settlement agreement, Fed.R.Civ.P. 23(e)(3), and the trial court "must direct notice in a reasonable manner to all class members who would be bound by the" proposed settlement, Fed.R.Civ.P. 23(e)(1). In addition, the trial court may approve a proposed settlement "only after a hearing and on finding that [the proposed settlement] is fair, reasonable, and adequate." Fed.R.Civ.P. 23(e)(2).

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Here, as detailed above, the parties submitted the terms of settlement, which the Court has preliminarily approved. *Joint Motion for Preliminary Approval; Order of Preliminary Approval.* Notice provided to the Class was effected in conformity with the directions of the Court. *Order of Preliminary Approval,* ¶¶ 5–6; *Notice,* attached thereto; *Unsworn Declaration of Mark Hooks,* submitted as *Defendant's Exhibit A,* attached to *Minute Entry,* Doc. No. 191, p. 71 (*"Hooks Declaration"*). More specifically, Mark Hooks, a Warden's Assistant at CCI, posted copies of the *Notice to Class Members of the Proposed Settlement* in (1) all housing units; (2) all law libraries; and (3) other prominent common locations where all inmates would have access to read it. *Hooks Declaration,* ¶ 2. Mr. Hooks also provided that notice directly to each inmate whose access to common areas was limited due to, but not limited to, confinement in segregation or in the infirmary. *Id.* In addition, copies of the following documents were placed in the CCI library: (1) *Order of Preliminary Approval;* (2) *Notice to Class Members of Proposed Settlement;* (3) *Private Settlement Agreement;* and (4) *Defendants' Notice of Supplement to the Private Settlement Agreement (Doc. 170–1),* Doc. No. 173 (*"Notice of Supplement"*) (supplementing the *Private Settlement Agreement* with the signature of ODRC Director Gary Mohr). *Id.* at ¶ 3. According to Mr. Hooks, the *Notice* was posted and copies were available in the library by December 10, 2011. *Hooks Declaration,* ¶ 4.

***16** The initial hearing was held on March 13, 2012 and the reopened hearing was held on April 2, 2012. The Court must now determine if the *Private Settlement Agreement* is "fair, reasonable, and adequate." Fed.R.Civ.P. 23(e)(2). In making this determination, the Court considers several factors:

> (1) the risk of fraud or collusion; (2) the complexity, expense and likely duration of the litigation; (3) the amount of discovery engaged in by the parties; (4) the likelihood of success on the merits; (5) the opinions of class counsel and class representatives; (6) the reaction of absent class members; and (7) the public interest.

Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C., 636 F.3d 235, 244 (6th Cir.2011) (quoting *UAW v. Gen'l Motors Corp.,* 497 F.3d 615, 631 (6th Cir.2007)) (internal quotation marks omitted). In considering these factors, the task of the court "is not to decide whether one side is right or even whether one side has the better of these arguments.... The question rather is whether the parties are using settlement to resolve a legitimate legal and factual disagreement." Gen'l Motors Corp, 497 F.3d at 632.

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A. The Terms of the *Private Settlement Agreement*

Under the terms of the *Private Settlement Agreement,* asbestos at CCI will be abated in accordance with a prioritized plan developed by the parties with the assistance of Chryatech, Incorporated ("Chryatech"), a firm that provides, *inter alia,* asbestos consulting services. *Id.* at ¶ 5; *Chryatech Qualification Statement* and *Executive Summary,* attached as Exhibit 1–A to the *Private Settlement Agreement* ("Chryatech Report"), p. 628.[11] "All Chryatech, Inc. technical personnel are trained as required by Federal (EPA and OSHA) and State regulations. They are also licensed/certified by applicable State asbestos regulations." *Id.* at 626 (stating further that "a successful project is one that completely satisfies ... all applicable environmental, building and safety regulations"); 650 ("All Chryatech, Inc. personnel are licensed through the Ohio Department of Health.").

11 The Court will refer to the docket page number in the upper right-hand corner when discussing this document.

From December 6, 2010 through January 26, 2011, and acting at the request of state officials, Chryatech visited CCI in order to conduct an asbestos reassessment survey. *Id.* at 648. On May 9, 2011, Chryatech inspected the tunnels and spaces below CCI's buildings in order to assess suspected asbestos in these areas. *Id.* In all, Chryatech surveyed 41 buildings at CCI. *Id.* at 650.

Chryatech reported that the Environmental Protection Agency ("EPA") had developed a method for ranking materials containing asbestos, which has become the industry's "state-of-the-art-method[.]" *Id.* "The rankings of hazard range from 7—the most hazardous [-] to 1—the least hazardous. The highest rank is reserved for ACBM [friable asbestos-containing building material] that is 'significantly damaged.' " *Id.* A hazard with "significant damage" "is so extensively damaged or deteriorated that it requires immediate corrective action." *Id.* This type of hazard exists in circumstances such as where "[f]riable asbestos-containing building material[12] (ACBM) is in an area regularly used by building occupants, including maintenance personnel, in the course of their normal activities[.]" *Id.*

12 "Friable asbestos material" is "any material containing more than 1% asbestos that, when dry, can be crumbled, pulverized, or reduced to a powder by hand pressure." Abestos Operations & Maintenance Program (the "O & M Program"), attached as Exhibit 1–B to Doc. No. 170.

***17** Chryatech also reported that, with few exceptions, CCI's main tunnels and areas below the buildings had been abated and no suspect materials/debris was observed. *Id.* at 649. Applying the EPA ranking method to the remaining areas, Chryatech created spreadsheets "listing the hazard rank, location, type, quantity, and estimated abatement cost for removal by a State certified contract

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for all of the ACM [asbestos containing materials] we observed." *Id.* at 650. *See also* Chryatech spreadsheets, attached as Exhibit 1–C to Doc. No. 170 ("Chryatech Spreadsheets"). For example, Chryatech identified Dorms D–1, D–2 & D–3 as having friable asbestos-containing materials. Chryatech Spreadsheets, p. 2. Chryatech specifically advised that its spreadsheets "should be used to address potential hazards that may exist [at CCI]." Chryatech Report, p. 650.

As a way of addressing remaining potential asbestos hazards at CCI, Chryatech created the Asbestos Operations and Maintenance Program ("O & M Program"), attached as Exhibit 1–B to the *Private Settlement Agreement,* which strives to "protect inmates at CCI from exposure to potentially hazardous asbestos conditions, ensure compliance with all applicable environmental laws and regulations relating to asbestos, and establish asbestos operation and management procedures for CCI." O & M Program, p. 1. In elaborating on the objectives of the O & M Program, Chryatech detailed CCI's responsibilities during the abatement work and the disposal of asbestos-containing waste in accordance with standards articulated by the Occupational Safety and Health Administration ("OSHA"). *Id.* at 4–16. For example, the O & M Program requires that individuals performing such work receive training specific to the class [13] of asbestos at issue. *Id.*

[13] OSHA recognizes different classes of asbestos work. *Id.* at 2–3. "Class I asbestos work" includes "activities involving the removal of thermal systems insulation and surfacing material." *Id.* at 2.

"Class II asbestos work" includes "activities involving the removal of ACM [asbestos containing material] which is not thermal systems insulation or surfacing material including, but not limited to, the removal of asbestos-containing wallboard, floor tile and sheeting, roofing and siding shingles, and construction mastics." *Id.*

"Class III asbestos work" includes "repair and maintenance operations where ACM, including thermal systems insulation and surfacing material, is likely to be disturbed." *Id.* at 3.

"Class IV asbestos work" includes maintenance and custodial activities during which employees/workers contact but do not disturb ACM/PACM [presumed asbestos-containing materials] and activities to clean up dust, waste, and debris resulting from Class I, II, and III asbestos work." *Id.*

Here, the parties "agree that asbestos at CCI should be addressed in a manner that minimizes inmates to the exposure to friable asbestos." *Private Settlement Agreement,* ¶ 5(B). Under the terms of the *Private Settlement Agreement,* CCI agrees to maintain asbestos according to industry standards and, if abatement work is required in areas containing asbestos, the O & M Program will be utilized. *Id.*

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Utilizing the Chryatech Report and Chryatech Spreadsheets, the *Private Settlement Agreement* ranks, in descending order of priority, the areas at CCI that contain asbestos-related material. *Id.* Under the *Private Settlement Agreement,* funding has already been made available to complete abatement in high priority areas, including (1) Dorms D–1, D–2 and D–3 (priority 1); (2) F–1 Dorm (priority 2); and (3) all remaining areas of the hospital building (priority 3). *Id.* The parties chose to address these locations because, according to Chryatech, these areas have the greatest amount of asbestos with the highest risk ranking based upon location, accessibility and condition of material. *Id.* The *Private Settlement Agreement* also contemplates that CCI will initiate the abatement process for these three priority areas within thirty days after the Court approves the parties' agreement. *Id.* [14]

14 Mr. Cholar testified at the initial hearing that abatement had already been completed in the specified D and F dorms and that abatement in the hospital building was expected to be completed by April 1, 2012.

***18** As for additional locations that contain asbestos-related material beyond the three priority areas identified above, CCI will address those other locations in accordance with the O & M Program until additional funding from the General Assembly becomes available. *Id.* "CCI will request funding for abatement of the remaining asbestos containing material at CCI at least yearly until all asbestos at CCI" identified in the *Private Settlement Agreement* has been remediated. *Id.*

The *Private Settlement Agreement* is enforceable in state court. *Id.* at ¶ 6(B). Thus, individual CCI inmates may file in state court an action arising out of the performance or non-performance of CCI's obligations under the *Private Settlement Agreement. Id.* [15]

15 Under the Prison Litigation Reform Act, 18 U.S.C. § 3626, prospective relief in a consent decree must be "narrowly drawn, extend [ ] no further than necessary to correct the violation of the Federal right, and [be] the least intrusive means necessary to correct the violation of the Federal right." § 3626(a)(1). However, private settlement agreements need not comply with those limitations and "any party claiming that a private settlement agreement has been breached" may seek "in State court any remedy available under State law." § 3626(c)(2)(B).

The *Private Settlement Agreement* tolls the statute of limitations (until this case is dismissed) for individual claims for personal injuries or other types of money damages relating to alleged exposure of asbestos in violation of the Eighth Amendment. *Id.* at ¶ 6(C). Stated differently, the *Private Settlement Agreement* preserves the right of individual inmates to assert their own claims, in either state or federal court, for personal injury arising from alleged asbestos exposure in violation of the Eighth Amendment. *Id.*

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With some exceptions, including individual claims for personal injury discussed above, the members of the Class agree to release all defendants of and from any and all claims, whether known or unknown, whether accrued or to accrue, relating to the removal or abatement of asbestos at CCI. *Id.* at ¶ 6(D).

Under the terms of the *Private Settlement Agreement,* the State of Ohio, on defendants' behalf, will pay to plaintiffs' class counsel attorneys' fees and expenses in the amount of $70,000. *Id* . at ¶ 7(D).

The *Private Settlement Agreement* contemplates that, upon Court approval, the parties will submit a stipulation of dismissal with prejudice. *Id.* at ¶ 6(A) (citing Exhibit 1–D, attached thereto). The Court will not retain jurisdiction over implementation of the *Private Settlement Agreement. Id.* [16]

16 Indeed, under the Prison Litigation Reform Act, the Court may not retain jurisdiction over enforcement of the terms of the *Private Settlement Agreement* "other than the reinstatement of the civil proceeding that the agreement settled." *See* 18 U.S.C. § 3626(c)(2).

B. There Is No Risk of Fraud or Collusion

Having carefully examined the terms of the *Private Settlement Agreement,* the Court now turns to the first factor of its inquiry, *i.e.,* the risk of fraud or collusion, in determining whether or not the *Private Settlement Agreement* is fair, reasonable and adequate. *See* *Poplar Creek Dev. Co.,* 636 F.3d at 244. Unless there is evidence to the contrary, "[c]ourts presume the absence of fraud or collusion in class action settlements[.]" *Leonhardt v. ArvinMeritor, Inc.,* 581 F.Supp.2d 818, 839 (E.D.Mich.2008). At the initial hearing, class counsel represented and Mr. Cholar testified that settlement discussions were extensive and at times heated. The procedural history of this litigation, detailed above, supports this representation and testimony. The parties reached an agreement only after more than three years of litigation, which included two years of settlement discussions. Throughout much of that time, the parties consulted or relied heavily on an independent expert, Chryatech, for guidance. *See, e.g., Order,* Doc. No. 69; *Order,* Doc. No. 123; *Order,* Doc. No. 129; *Order,* Doc. No. 134; *Order,* Doc. No. 142; *Order,* Doc. No. 143; *Order,* Doc. No. 149. [17] Chryatech's involvement therefore underscores a finding that the *Private Settlement Agreement* was the product of arms-length negotiations, rather than the result of fraud or collusion.

17 Counsel for both sides confirmed at the initial hearing that the periodic conferences with the undersigned reflected on the docket were status conferences and involved no substantive

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settlement discussions with the undersigned. Stated differently, these conferences simply required counsel to provide periodic updates on the status of the litigation.

***19** The objections filed by two CCI inmates characterizing the *Private Settlement Agreement* as the product of collusion does not require a different conclusion. Doc. No. 175, pp. 8–10; Doc. No. 189 (offering the letter dated July 2, 2010 signed by Mr. Donnellon as a supplement to Doc. No. 175). [18] Inmates William L. Ridenour and Tommy Lee Brown argue that evidence of collusion can be seen in the fact that the *Private Settlement Agreement* "affords only non-pecuniary relief to class members[.]" Doc. No. 175, p. 8. This objection misses the mark. To attempt to address the individual claims for compensatory damages on behalf of several thousand inmates would be nearly impossible. Indeed, whether or not such an action would qualify as an appropriate class action is debatable. However, the *Private Settlement Agreement* tolls the statute of limitations (until this case is dismissed) for individual claims for personal injuries or other types of money damages relating to alleged exposure of asbestos in violation of the Eighth Amendment. *Private Settlement Agreement,* ¶ 6(C). Therefore, although the *Private Settlement Agreement* does not offer monetary damages to the Class, the *Private Settlement Agreement* has preserved to all inmates at CCI the right seek monetary damages in connection with claimed personal injury arising from alleged asbestos exposure in violation of the Eighth Amendment. *Id.* The suggestion that the *Private Settlement Agreement* is collusive or fraudulent because it fails to provide monetary damages to a Class of approximately 2600 inmates, Doc. Nos. 175 and 189, is simply without merit. Accordingly, the Court finds no evidence of collusion or fraud, and this factor weighs in favor of finding the *Private Settlement Agreement* to be fair, reasonable and adequate.

18 A third inmate and former class representative, Jack Frederick, also filed an objection based, in part, on collusion as evidenced by the failure of the *Private Settlement Agreement* to authorize the payment of monetary damages. Doc. No. 188, p. 1. However, for the reasons discussed *supra* and *infra,* Mr. Frederick's objection is without merit.

C. Continued Litigation Would Be Complex, Expensive and Lengthy

In considering the next factor, it is indisputable that this action raises complex constitutional factual and legal issues and involves complicated scientific and medical evidence. Absent settlement, resolution of the litigation is likely to require many years more, would be extremely expensive and may entail an appeal from any judgment entered by this Court. This factor therefore weighs in favor of approving the *Private Settlement Agreement.*

D. The Parties Have Engaged In Extensive Discovery

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The parties have completed a significant amount of discovery over the past four years, producing more than 10,000 documents and taking 17 or 18 depositions. All of this information afforded the parties the opportunity to assess the strengths and weaknesses of each side. This factor therefore weighs in favor of finding the *Private Settlement Agreement* fair, adequate and reasonable.

E. Plaintiffs' Likelihood of Success on the Merits Is Not Overwhelming

" 'The most important of the factors to be considered in reviewing a settlement is the probability of success on the merits. The likelihood of success, in turn, provides a gauge from which the benefits of the settlement must be measured.' " *Poplar Creek Dev. Co. v. Chesapeake Appalachia, L.L.C.*, 636 F.3d at 245 (quoting *In re Gen. Tire & Rubber Co. Sec. Litig.*, 726 F.2d at 1086) (internal quotation marks omitted). In order to prevail on an Eighth Amendment claim such as that presented in this case, plaintiffs must establish that defendants were deliberately indifferent to the health or safety of the inmates. *See* *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994). In this regard, plaintiffs must bear "the onerous burden of proving [an] official's subjective knowledge" when establishing deliberate indifference. *Comstock v. McCrary*, 273 F.3d 693, 703 (6th Cir.2001). *See also* *Jones v. Muskegon County*, 625 F.3d 935, 947 (6th Cir.2010) (stating that deliberate indifference "is a very high standard of culpability, exceeding gross negligence") (quoting *Ross v. Duggan*, 402 F.3d 575, 590 n. 7 (6th Cir.2004) (internal quotation marks omitted). Failure to meet this high standard would foreclose all possibility of relief for the Class. Experienced counsel on both sides of the case acknowledge that establishing liability and causation in this action would be difficult. [19] The uncertainty surrounding plaintiffs' ability to establish their claims weighs in favor of approving the *Private Settlement Agreement.*

19 Class counsel represented that, even after conducting a nationwide search, they are unaware of any other prisoner class action asbestos case that survived summary judgment; the cases were either settled or dismissed.

F. Experienced Counsel and the Class Representative Support Approval of the *Private Settlement Agreement*

***20** Experienced counsel on both sides of this case recommend that the Court approve the *Private Settlement Agreement* and this recommendation is entitled to deference. *See, e.g.*, *Williams v. Vukovich*, 720 F.2d 909, 922–23 (6th Cir.1983) ("The court should defer to the judgment of experienced counsel who has competently evaluated the strength of his proofs[,]" and that deference "should correspond to the amount of discovery completed and the character of the evidence uncovered"). Here, class counsel have a combined professional experience of

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approximately 40 years. *See, e.g.,* Doc. No. 191, pp. 5–10 (detailing the experience of class counsel). Class counsel ask the Court to approve the *Private Settlement Agreement,* which they believe is in the best interests of the Class because it will improve prison conditions and bring immediate relief. Former lead counsel for defendants, Mr. Cholar, has practiced law for 20 years and has extensive experience in Section 1983 litigation as well as class actions. Mr. Cholar also agrees with class counsel that the *Private Settlement Agreement* is fair, adequate and reasonable.

In addition, and as recounted at length *supra,* class representative Alfonsia Perry testified that he wants the Court to approve the *Private Settlement Agreement* because he believes that it is fair. Accordingly, the judgment of experienced counsel and the opinion of the class representative support the approval of the *Private Settlement Agreement.*

G. The Objections to the *Private Settlement Agreement* Lack Merit

In determining whether a class action settlement is fair, adequate and reasonable, a court must also consider the reaction of absent class members. *Brotherton v. Cleveland,* 141 F.Supp.2d 894, 906 (S.D.Ohio 2001). "The fact that some class members object to the Settlement [Agreement] does not by itself prevent the court from approving the agreement." *Id.* Moreover, "if only a small number of objections to a class action settlement are received, that fact can be viewed as indicative of the adequacy of the settlement." *In re Delphi Corp. Sec.,* 248 F.R.D. 483, 500 (E.D.Mich.2008). *See also Hainey v. Parrott,* 617 F.Supp.2d 668, 675 (S.D.Ohio 2007) ("Generally, however, a small number of objections, particularly in a class of this size, indicates that the settlement is fair, reasonable and adequate.").

Here, out of approximately 2600 class members, only 16 objections were filed, for a total objection rate of .6%. *See* Doc. Nos. 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 188, 189, 193, 194, 202. The actual objection rate is even lower when one considers that some inmates filed more than one objection [20] and that at least one objector lacks standing to object because he is no longer incarcerated at CCI. [21] Finally, Alfonsia Perry, the class representative, repudiated his objection. *See* Doc. Nos. 185 (filed by Mr. Perry, who later renounced this objection under oath), 186 (purporting to withdraw Doc. No. 185). Therefore, this miniscule percentage of objections relative to the size of the Class weighs in favor of finding the *Private Settlement Agreement* to be fair, reasonable and adequate. *See In re Delphi Corp. Sec.,* 248 F.R.D. at 500; *Hainey,* 617 F.Supp.2d at 675.

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20 *See* Doc. Nos. 175 (filed by William Ridenour and Tommy Lee Brown), 183 (filed by Michael Roberts), 189 (filed by Messrs. Ridenour and Brown), 193 (filed by, *inter alios,* Mr. Roberts), 194 (filed by Mr. Roberts).

21 *See* Doc. No. 188 (filed by Jack Frederick from the Pickaway Correctional Institution).

***21** Moreover, even after considering the merits of all the objections, the Court finds no reason to conclude that the *Private Settlement Agreement* is unfair, inadequate or otherwise unreasonable.

1. *Private Settlement Agreement* Allows Defendants to Deny Constitutional Culpability

Some inmates object to the *Private Settlement Agreement* because it allows defendants to deny constitutional culpability. *See* Doc. Nos. 180, 181, 182, 183, 193. As an initial matter, the Court notes that permitting a party to deny legal culpability is a fairly common term in settlement agreements; the fact that defendants do not concede liability on plaintiffs' claims does not render the *Private Settlement Agreement* unfair or unreasonable. The Court concludes that the *Private Settlement Agreement* carefully balances the rights of individual Class members to file their own actions for monetary damages and the interest of the Class in obtaining immediate relief. This objection provides no basis for rejecting the *Private Settlement Agreement.*

2. Relief Under the *Private Settlement Agreement* Is Contingent on Funding by the General Assembly

At least one objection complains that, because defendants' obligations under the *Private Settlement Agreement* are in certain respects contingent on funding by the Ohio General Assembly, the Class will have no recourse should the Ohio General Assembly fail to fund the remediation. *See* Doc. No. 175. However, as the *Private Settlement Agreement* makes clear, *Private Settlement Agreement,* ¶ 5(B), funding is already available to remediate the areas most affected by asbestos. Mr. Cholar testified that defendants have already obtained funding to deal with approximately 90% of the asbestos-related material. Mr. Cholar also explained that the State cannot, under Ohio law, enter into an agreement that requires the expenditure of public funds that have not yet been allocated. In this regard, the *Private Settlement Agreement* imposes a continuing yearly obligation to request more funding until all obligations under the *Private Settlement Agreement* have been met. *Id.* Finally, and as noted *supra,* the Class may seek enforcement of any failure on the part of defendants to fulfill their obligations under the *Private Settlement Agreement.* In short, this feature of the *Private Settlement Agreement* does not render it unfair, inadequate or unreasonable.

3. Remediation Occurs While Inmates Still Live in CCI and Violates OSHA

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Other inmates object to the *Private Settlement Agreement* because inmates must continue living in CCI during the remediation process, allegedly in violation of OSHA standards. *See* Doc. Nos. 176, 177, 178, 179, 180, 181, 182, 183, 194, 202. These objections also note, *inter alia,* that inmates are to be rotated in and out of dorms D–1, D2 and D–3 in violation of OSHA and that "sociopathic" inmates have access to friable asbestos during the remediation process.

***22** These objections are without merit. The suggestion that "sociopathic" inmates have access to asbestos is unsupported by any evidence whatsoever. Chryatech, whose employees are certified in asbestos remdiation and abatement, has detailed CCI's responsibilities during the abatement work and the disposal of asbestos-containing waste in accordance with OSHA standards. Stated differently, defendants are to follow a plan developed by Chryatech that complies with state and federal law. For example, Mr. Cholar testified that air quality safety testing is required during the remediation process and that prison officials utilize the services of a third party in obtaining air samples. Moreover, defendants utilize a "glovebag" method for containing asbestos, a process that complies with state and federal regulations and which does not require that inmates be removed during the remediation process.

To the extent that inmate Michael Roberts offers his sworn contention that CCI remediation violates OSHA and/or other state and federal laws, Doc. No. 194, the Court is not persuaded that Mr. Roberts is an expert in asbestos remediation. As detailed *supra,* the Chryatech Report is comprehensive and was developed by experts certified in the field. In short, there is no evidence that the *Private Settlement Agreement,* in addressing the containment and removal of asbestos-related material, violates OSHA or any other law.

4. Closure of CCI Is the Only Proper Remedy

Some objecting inmates demand that CCI be closed. Doc. Nos. 175, 185. [22] However, Mr. Cholar, who has years of experience in prison litigation, testified that closing CCI—either temporarily or permanently—would be almost impossible: there are simply not enough beds at other Ohio prisons to accommodate the approximately 2600 inmates who would be displaced were CCI to be closed. Based on this evidence, the Court is not persuaded that a fair, adequate and reasonable settlement requires the closure of CCI.

22 Although Mr. Perry later repudiated the objections contained within this document, documents attached to the objection indicate that other inmates, Bill Moralevitz, Charles Soward and Claude Spencer, object to the *Private Settlement Agreement* for the reasons contained therein. Doc. Nos. 185–1, 185–2.

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5. The *Private Settlement Agreement* Does Not Provide Monetary Damages

Most of the objections relate to the failure of the *Private Settlement Agreement* to provide any monetary damages to inmates. *See* Doc. Nos. 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 188, 193. However, as discussed *supra,* the *Private Settlement Agreement* preserves each class member's right to pursue a claim for monetary relief. *See Private Settlement Agreement,* ¶ 6(C). Moreover, the highly individualized analyses necessary to such claims call into question the propriety of the class action as a vehicle for resolving such claims. These objections do not weigh against the approval of the *Private Settlement Agreement.*

6. Defendants Cannot Be Trusted to Comply with the Terms of the *Private Settlement Agreement*

Finally, some inmates are concerned that defendants cannot be trusted to abide by the terms of the *Private Settlement Agreement. See* Doc. Nos. 185, 188. These concerns do not militate against approval. First, defendants have already nearly completed much of the remediation required by the *Private Settlement Agreement.* Second, should defendants fail to fulfill their obligations, the *Private Settlement Agreement* is, as noted *supra,* enforceable in state court. *Private Settlement Agreement,* ¶ 6(B). These objections are without merit.

***23** In sum, none of the objections provide a basis for rejecting the *Private Settlement Agreement.*

H. The *Private Settlement Agreement* Supports the Public Interest

"There is a strong public interest in encouraging settlement of complex litigation and class-action suits because they are notoriously difficult and unpredictable and settlement conserves judicial resources." *In re Cardizem CD Antitrust Litig.,* 218 F.R.D. 508, 530 (E.D.Mich.2003) (citing *Granada Investments, Inc. v. DWG Corp.,* 962 F.2d 1203, 1205 (6th Cir.1992)). Here, the Court agrees with counsel for both sides that removing asbestos from CCI improves prison conditions for inmates and staff, which in turn furthers society's broader interests. Settlement of this case also conserves judicial resources by bringing this litigation to a close. In sum, the Court is persuaded that creating a safer environment at CCI serves the public interest, which weighs in favor of approving the *Private Settlement Agreement.*

I. Attorneys' Fees and Expenses

The *Private Settlement Agreement* authorizes the payment to class counsel attorneys' fees and expenses in the amount of $70,000.00. *Private Settlement Agreement,* ¶ 7(D). Pursuant to 42 U.S.C. § 1988, a "court, in its discretion, may allow the prevailing party, other than the United

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States, a reasonable attorney's fee as part of the costs[.]" 42 U.S.C. § 1988(b). One method for determining a "reasonable" fee is the lodestar analysis, which requires the calculation of " 'the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate.' " *Wayne v. Village of Sebring,* 36 F.3d 517, 531 (6th Cir.1994) (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 433, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). *See also Rawlings v. Prudential–Bache Prop., Inc.,* 9 F.3d 513, 517 (6th Cir.1993) (noting that the district court "recognized that it had a choice between the two methods [of calculating attorney's fees, the lodestar analysis and the percentage of fund method]"). The United States Supreme Court has recognized several benefits of a lodestar analysis. *See Perdue v. Kenny,* —— U.S. ——, 130 S.Ct. 1662, 1672, 176 L.Ed.2d 494 (2010). For example, using "prevailing market rates in the relevant community[,]" this method awards approximately what the prevailing attorney would have earned from a client paying hourly attorney wages in a comparable case. *Id.* (citations and internal quotation marks omitted). In addition, the lodestar approach is "readily administratable." *Id* . (citations and internal quotation marks omitted). Finally, the lodestar method provides an "objective" calculation, which "produces reasonably predictable results." *Id.* (citations and internal quotation marks omitted). Indeed, the lodestar analysis has "achieved dominance in the federal courts" and has "become the guiding light of our fee-shifting jurisprudence." *Id.* (quoting *Gisbrecht v. Barnhart,* 535 U.S. 789, 801, 122 S.Ct. 1817, 152 L.Ed.2d 996 (1984)) (internal quotation marks omitted). Accordingly, the Court concludes that the lodestar analysis is an appropriate method for determining a reasonable attorneys' fee in this case.

***24** The parties have agreed that an award of $70,000.00 will compensate class counsel for not only all fees and expenses already incurred but also all fees and costs that may be incurred in the future. *Private Settlement Agreement,* ¶ 7(D). Class counsel have submitted detailed information regarding their normal hourly rates, and that of a paralegal, and have specified the hours expended by them on this matter. *Plaintiff's Bench Memorandum Regarding Attorney Fees and Expenses,* attached to *Minute Entry,* Doc. No. 191, pp. 2–70. The amount authorized in the *Private Settlement Agreement, i.e.,* $70,000, is well below the amount suggested by the lodestar calculation. *See, e.g.,* Doc. No. 191, p. 18. [23] The Court is satisfied that the $70,000 award of attorney's fees in this case is reasonable, *i.e.,* "one that is adequately compensatory to attract competent counsel yet which avoids producing a windfall for lawyers." *Adcock–Ladd v. Sec'y of Treasury,* 227 F.3d 343, 349 (6th Cir.2000) (quoting *Reed v. Rhodes,* 179 F.3d 453, 471 (6th Cir.1999)).

[23] The lodestar analysis would suggest an award of attorneys' fees of approximately $175,000.

IV. MOTIONS TO INTERVENE

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Several inmates filed motions "to be added to the on going law suit," which were docketed as motions for leave to intervene. Doc. Nos. 155, 157, 158,[24] 161, 162, 168, 169.[25] The Honorable John D. Holschuh, the former trial judge in the case, ordered that motions for leave to intervene be stayed pending resolution of the joint motion to certify a settlement class. *Order,* Doc. No. 76. The named parties take the position that, should this Court certify the Class and approve the *Private Settlement Agreement,* these motions would be rendered moot because any movants still incarcerated at CCI would be included as members of the Class.

24 Shawn Harris, the inmate who filed Doc. No. 158, is no longer incarcerated at CCI. *Notice of Change of Address,* Doc. No. 195.

25 David Cobb, who may also have expressed an interest in joining the action, *see* Doc. No. 150, is no longer incarcerated at CCI. *Notice of Change of Address,* Doc. No. 187.

It is not at all clear to the Court that movants actually seek leave to intervene in the action as named parties. Rather, all the motions appear to express interest in, and support for, the class action. It is notable, in the Court's view, that none of the movants filed objections to the *Private Settlement Agreement.* In any event, none of the movants demonstrates that he "is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect [his] interest," Fed.R.Civ.P. 24(a)(2), or that "the existing parties [do not] adequately represent that interest." *Id.* Intervention of right is therefore unwarranted. Moreover, although each of the movants articulated "a claim ... that shares with the main action a common question of law or fact," *see* Fed.R.Civ.P. 24(b)(1)(B), to permit intervention at this stage of the proceedings would "unduly delay or prejudice the adjudication of the original parties' rights." Fed.R.Civ.P. 24(b)(3). Permissive intervention is therefore also unwarranted.

The motions for leave to intervene, Doc. Nos. 155, 157, 158, 161, 162, 168, 169, are therefore **DENIED.**

V. REQUESTS TO WITHDRAW DOC. NOS. 185, 192, 193

***25** Mr. Perry, the class representative, has moved to withdraw his previously filed objection, Doc. No. 185, *See* Doc. No. 186, and class counsel moved, at the reopened hearing, for leave to withdraw the *Motion for Multiple Class Representatives,* Doc. No. 192, and *Motion Regarding Adequacy of Class Counsel,* Doc. No. 193, in light of Mr. Perry's sworn disavowal of the content of those motions. Because the Court has now reviewed the substance of Mr. Perry's objection and motions, the Court **DENIES** the requests to withdraw that objection and those motions.

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WHEREUPON, plaintiff Alfonsia Perry's notice of withdrawal, Doc. No. 186, of his objection, Doc. No. 185, and class counsel's oral request to withdraw Doc. Nos. 192 and 193, are **DENIED.** All objections to the *Private Settlement Agreement,* Doc. Nos. 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 188, 189, 193, 194, 202, are **OVERRULED.** The motion to add multiple class representatives, Doc. No. 192, as well as the motion signifying lack of fair and adequate representation, Doc. No. 193, are **DENIED.** The maintenance of the action as a class action pursuant to Fed.R.Civ.P. 23(b)(2) is **APPROVED.** The Court **CERTIFIES** a class of plaintiffs consisting of all inmates in areas identified as containing unabated asbestos at CCI. The parties' request that the Court give final approval to the *Private Settlement Agreement,* attached as Exhibit 1 to the *Joint Motion for Preliminary Approval of Proposed Class Action Settlement,* Doc. No. 170, is **GRANTED.** The Court hereby **APPROVES** the Private Settlement Agreement. The motions for leave to intervene, Doc. Nos. 155, 157, 158, 161, 162, 168, 169, are **DENIED.**

All Citations

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United States District Court,
E.D. Michigan,
Southern Division.

Eric DOWDY–EL, Averis X. Wilson, Amira Salem, Tom Traini and Roger Hunt, Plaintiffs,
v.
Patricia L. CARUSO, Michael Martin, and Dave Burnett, Defendants.

No. 06–11765.
|
Aug. 15, 2012.

Attorneys and Law Firms

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John L. Thurber, Office of the Attorney General, Lansing, MI, for Defendants.

REPORT AND RECOMMENDATION ON PLAINTIFFS' MOTION FOR CLASS CERTIFICATION [56]

DAVID R. GRAND, United States Magistrate Judge.

***1** Before the court is the Plaintiffs' Motion for Class Certification [56], which has been referred to the undersigned for a report and recommendation pursuant to 28 U.S.C. § 636(b)(1)(B). For the reasons set forth below, **IT IS RECOMMENDED** that Plaintiffs' motion be **GRANTED.**

I. *BACKGROUND*

Plaintiffs are Muslim [1] inmates housed by the Michigan Department of Corrections ("MDOC") who challenge the defendant prison officials' alleged failure to accommodate their requests to observe three distinct Islamic religious practices: (1) attending *Jum'ah* prayer services; (2)

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receiving a *halal* diet; and (3) participating in the *Eid ul-Fitr* and *Eid ul-Adha* Feasts (the *"Eid* Feasts").[2] On July 24, 2012, this court issued a Report and Recommendation (the "R & R") regarding the parties' cross-motions for summary judgment. Doc. # 70. The R & R discussed the factual background behind the Plaintiffs' claims and the Defendants' defenses, R & R at 1–6, and the court incorporates that discussion by reference here. The court will nevertheless briefly describe Plaintiffs' claims as they relate to the instant motion for class certification.

1 This court has recommended that the sole non-Muslim plaintiff's claims be dismissed. Doc. # 70 at 2, fn. 1.

2 Plaintiffs challenge each alleged failure to accommodate under: (1) the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution; (2) the Free Exercise Clause of the First Amendment of the United States Constitution, (3) the Michigan Constitution's counterparts to the United States Constitution's Equal Protection Clause and Free Exercise Clause, Article I, §§ 2 and 4, respectively; and (4) the Religious Land Use and Institutionalized Persons Act of 2000, 42 U.S.C. § 2000cc *et seq.* ("RLUIPA").

1. *Jum'ahClaims*

Jum'ah is a weekly congregational prayer service that begins on Fridays at about noon and lasts for approximately one hour. MDOC Policy Directive 05.03.150 (the "Policy Directive") provides in pertinent part:

> V. Staff shall not make special provisions for the observance of religious holidays except as authorized and specifically provided for by Department policy.
>
> * * * *
>
> BB. Prisoners shall not be released from work or school assignments to attend group religious services or activities, consistent with restrictions on attending other personal interest activities. Religious services and activities should be scheduled when the majority of prisoners have leisure time (e.g., evening and weekend hours) ...
>
> Policy Directive, ¶¶ V, BB (collectively, the "Work Release Policy" or the "Policy").

Under the Policy, observant Muslim inmates who are assigned to work and/or school duty that conflict with *Jum'ah* services are simply unable to attend those services. The parties agree, however, that Defendants employ an unwritten, un-defined, and "sporadic" "policy of granting permission to attend religious services on a case by case basis." R & R at 4. Plaintiffs request

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either that they not be assigned to work or school duties that conflict with *Jum'ah,* or that they be freely (as opposed to sporadically) given "call-outs" to attend those services. Defendants argue that the Policy is lawful in light of security concerns that would exist if inmates could self-select a portion of their schedules.

This court recommended dismissing Plaintiffs' related constitutional claims. R & R at 29–31, 35–37. However, RLUIPA imposes a greater burden on Defendants than does the First or Fourteenth Amendments, and requires them to show the Work Release Policy is the least restrictive means of addressing their safety concerns. *Colvin v. Caruso,* 605 F.3d 282, 296 (6th Cir.2010) ("The constitutional protection afforded [to inmates] under § 1983 is less strong" than those afforded under RLUIPA). *See also* R & R at 27. This court found that material questions of fact existed regarding the "least restrictive means" issue, and, as a result, recommended denying summary judgment on the *Jum'ah* RLUIPA claim. R & R at 18–21.

***2** Plaintiffs seek to certify a class comprised of "all current and future Michigan Muslim inmates who desire but have been denied ... the ability to participate in *Jum'ah* because of a conflicting work, school or similar detail. [56 at 20].

2. *Halal Diet Claims*

Plaintiffs allege that their faith requires adherence to dietary restrictions that prohibit the consumption of any food that is not *"halal"*. Compl., ¶ 24. In other words, they desire a diet comprised of *halal* meats and/or vegetarian foods that have not been "cross-contaminated" by coming into contact with non-*halal* meats. Defendants contend that they are unable to provide a special *halal* diet due to cost constraints, but claim that they take measures to ensure that cross-contamination does not occur. This court recommended granting Defendants' summary judgment motion as to Plaintiffs' *halal* diet claim under the First Amendment's Free Exercise Clause (and related Michigan constitutional provision), but permitting their other *halal* diet claims to proceed. R & R at 40.

Plaintiffs seek to certify a class comprised of "all current and future Michigan Muslim inmates who desire but have been denied ... a halal diet that is free of contamination by foods considered haram," *i.e.,* non-halal meats and/or vegetarian foods that have been "contaminated" by coming into contact with such meats. [56 at 20].

3. *Eid FeastClaims*

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Plaintiffs also challenge the Defendants' alleged failure to accommodate their observance of the *Eid* Feasts. However, after this action was filed, the MDOC issued a Memo which made clear that observant Muslim inmates would be allowed to participate in the *Eid* Feasts. R & R at 6, 37. Defendants argued that the Memo rendered Plaintiffs' *Eid* Feast claims moot. This court found that Plaintiffs' claims were not moot because the Memo's contents had not been sufficiently incorporated into the Policy Directive as other allowable religious observances had been. R & R at 37–39. However, recognizing that Defendants do not dispute observant inmates' right to participate in the *Eids,* this court recommended granting summary judgment in Plaintiffs' favor on those claims. *Id.*

Whether or not this court's recommendation is ultimately adopted by the district court, the class certification question on Plaintiffs' *Eid* feasts claims is clearly moot; if the district court accepts the recommendation, the claims will have been resolved in the Plaintiffs' favor, and if the court rejects the recommendation, the Defendants will have prevailed. Accordingly, the class certification issue on those claims need not be addressed further.

II. *STANDARD OF REVIEW*

Federal Rule of Civil Procedure 23(a) provides that "[o]ne or more members of a class may sue or be sued as representative parties on behalf of all members only if:

> (1) the class is so numerous that joinder of all members is impracticable;
>
> ***3** (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class."

Fed.R.Civ.P. 23(a).

"Although Rule 23(a)(2) refers to common questions of law or fact, in the plural, there need only be one question common to the class-though that question must be a 'common issue the resolution of which will advance the litigation.' Ultimately, the class may only be certified if, "after a rigorous analysis," the district court is satisfied that these prerequisites have been met. The burden is on the plaintiff "to establish his right" to class certification." *Alkire v. Irving,* 330 F.3d 802, 820 (6th Cir.2003) (citations omitted).

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In addition to satisfying the Rule 23(a) criteria, the proposed representative plaintiffs must also meet one of the criteria listed in Rule 23(b). Here, Plaintiffs claim they satisfy Rule 23(b)(2) [56 at 10], which provides that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole ..." Fed.R.Civ.P. 23(b)(2).

III. *ANALYSIS*

A. *Rule 23(a)(1)—Numerosity*

Defendants do not dispute that Plaintiffs satisfy Rule 23(a) (1)'s numerosity requirement with respect to either of the proposed classes for their *Jum 'ah* or *halal* diet claims. Doc. # 62 at 2. The court also finds that Plaintiffs easily satisfy this requirement for both sets of claims. Plaintiffs allege (and Defendants do not dispute) that as of December 31, 2009, the MDOC housed in excess of 1,800 Muslim inmates. *Id.;* Doc. # 56 at 12. Plaintiffs have also shown that the each of the religious practices they seek to observe are sufficiently central to their faith that there are likely to be at least many hundreds of Muslim inmates in the proposed classes. Doc. # 56 at 12. Such numbers, particularly considering their status as inmates, easily satisfies Rule 23(a) (1)'s numerosity requirement. *See Glover v. Johnson,* 85 F.R.D. 1 (E.D.Mich.1977); *Johnson v. Martin,* 2002 U.S. Dist. LEXIS 12550 at *13 (W.D.Mich. Apr. 29, 2002); *Roman v. Korson,* 152 F.R.D. 101, 105 (W.D.Mich.1993) (noting the "modern trend is to require a minimum of between 21 and 40 members" to meet the numerosity requirement).

B. *Rule 23(a)(2)—Commonality*

Rule 23(a) (2)'s "commonality" requirement "deals with shared questions of law or fact," and requires the representative plaintiffs to show that "there are questions of law or fact common to the class." *Sprague v. General Motors Corp.,* 133 F.3d 388, 397 (6th Cir.1998); Fed.R.Civ.P. 23(a) (2). As noted above, there "need only be one question common to the class" for the representative Plaintiffs to satisfy this "commonality" requirement. *Alkire,* 330 F.3d at 820; *In re. Whirlpool Corp. Front–Loading Washer Products,* 678 F.3d 409, 419 (6th Cir.2012) ("There need only be one question common to the class ...") (quoting *Sprague,* 133 F.3d at 397). However, not every "common question" of law or fact will suffice; "[w]hat we are looking for is a common issue the resolution of which will advance the litigation." *Sprague,* 133 F.3d at 397.

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***4** "[C]ases involving enforcement of a uniform policy or procedure, including those relating to prisoners, are often approved as class actions because they involved questions of fact and law common to all members." *Johnson,* 2002 U.S. Dist. LEXIS 12550 at *14 (*citing inter alia,* *Armstrong v. Davis,* 275 F.3d 849, 868–69 (9th Cir.2001) ("in a civil-rights suit, [ ] commonality is satisfied where the lawsuit challenges a system-wide practice or policy that affects all of the putative class members ...")). *See also* *Jones v. Goord,* 190 F.R.D. 103, 111 (S.D.N.Y.1999) ("The requirement that there be common questions of law and fact is satisfied in an action by prison inmates when 'inmates have a common interest in preventing the recurrence of the objectionable conduct.' ") (citations omitted). As the court in *Glover* explained:

> Clearly each individual member of the class has a unique situation and has been affected in diverse ways by the alleged discriminatory policy. That there are differences in situation and effect does not preclude a finding by this Court of commonality. That each class member's case is in other ways unique does not affect the commonality of the action, as long as the members of the class have allegedly been affected by a general policy of the defendant, and the general policy is the focus of the litigation.

Glover, 85 F.R.D. at 4–5 (quoting *Sweet v. General tire & Rubber Co.,* 74 F.R.D. 333, 335 (N.D.Ohio 1976)). The court examines each of Plaintiffs' two sets of claims separately in this regard.

i. *Jum'ah* Claims

Plaintiffs' *Jum'ah* claims present issues common to every prospective class member. The Work Release Policy prohibits inmates from being "released from work or school assignments to attend group religious services or activities, consistent with restrictions on attending other personal interest activities." Policy Directive, ¶ BB. Thus, all prospective Plaintiffs who wish to attend *Jum'ah* but who are unable to do so because they have a conflicting work or school assignment, face the same strict impediment to attending those religious services. *Glover,* 85 F.R.D. at 4–5.

As this court found in its R & R, even if the decision on whether to grant any particular accommodation turns on case-by-case analysis, that alone would not resolve the legal issues in this case because the Policy, at least on its face, prevents such accommodations. R & R at 21. The salient question in this case is whether the Work Release Policy is the least restrictive means of addressing the Defendants' security concerns, because with that Policy in place, an inmate may never obtain

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the individualized case-by-case consideration. R & R at 18–21. Thus, the Policy's underlying legality is a question that is common to all members of the proposed class, and achieving a final answer to that question will certainly advance this litigation. *Sprague,* 133 F.3d at 397.

Defendants' merged the entirety of their "commonality" and "typicality" arguments into one single paragraph:

> ***5** It is the Defendants position that the Plaintiffs cannot satisfy prerequisites 2 and 3 because the various faiths represented by the Plaintiffs it is unclear whether there are questions of law common to all of the potential class members and whether the Plaintiffs' claims are typical of the potential class. The Plaintiffs are members of three different faiths, Sunni Islam (Salem and Traini), the Nation of Islam (Wilson), and the Moorish Science Temple of America (Dowdy–El). While all three of the aforementioned faiths share some common beliefs, in practice, they may have very different belief systems. It is unclear whether the injunctive relief the individual Plaintiffs seek would satisfy the membership of three separate faiths. For example, members of the Nation of Islam (NOI) often choose to follow a diet prescribed by Elijah Muhammad. The diet set forth Elijah Muhammad is far more restrictive than a standard halal diet. For example, NOI members who follow Elijah Muhammad's diet cannot eat meat or potatoes. Consequently, any relief this Court might order with respect to halal diets might not satisfy many members of the NOI. Any relief this Court might order that satisfies mainstream Sunni Muslims might not satisfy Shi'a Muslims, the Nation of Islam, or the Moorish Science Temple of America. Accordingly, the Defendants submit that this Court should deny class certification.

Doc. # 62 at 3.

Defendants' vague response does not alter the above analysis. Defendants focused solely on Plaintiffs' *halal* diet claim, and made no specific argument with respect to their *Jum'ah* claims. And, as discussed above, while individual circumstances might be relevant to a case-by-case consideration of accommodation denials, they are irrelevant to the initial question of the Policy's overall legality.

In sum, the Work Release Policy's legality under RLUIPA presents a question of law common to each proposed class member, and Rule 23(a)(2)'s commonality requirement is satisfied. *See*

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Mayweathers v. Newland, 258 F.3d 930, 933 (9th Cir.2001) (noting that the district court had certified a class of Muslim inmate plaintiffs who had sought relief similar to what the Plaintiffs seek in this case).

ii. *Halal* Diet Claims

Because the MDOC has a policy of not providing a *halal* diet to observant Muslim inmates, Doc. # 55 at 9, Plaintiffs' claims challenging that policy satisfy Rule 23(a)(2)'s commonality requirement. *Glover,* 85 F.R.D. at 4–5. Here, common questions of both law and fact underscore Plaintiffs' *halal*-diet claims, including: (1) whether Defendants are, in general, legally required to provide inmates with a special *halal* diet under any circumstances; (2) whether, if that question is answered in the affirmative, Defendants have shown that such a requirement ought not to apply with respect to them due to their alleged financial condition; and (3) whether, regardless of the answer to the initial question, Defendants do, in fact, provide a diet that is *halal*-compliant. *See* R & R at 21–26; *Glover,* 85 F.R.D. at 4–5.

6** As noted above, Defendants' only response to the "commonality" question was to note that the three different forms of Islam practiced by the instant Plaintiffs ***"may have very different belief systems" and that it was ***"unclear*** whether the injunctive relief [requested] would satisfy" their respective faiths. Doc. # 62 at 3 (emphasis added). Defendants' assertions are equivocal on their face, and were not supported by references to any record evidence. Instead, Defendants offered an equally unsupported hypothetical regarding the types of foods that are allowable under the different forms of Islam. *Id.* Moreover, even if there are some individual discrepancies in the types of foods that Defendants believe would be allowed under the different forms of Islamic practice, those differences are immaterial here where the proposed class is narrowly defined as including only: "all current and future Michigan Muslim inmates who desire but have been denied ... a halal diet that is free of contamination by foods considered haram." Doc. # 56 at 20. *See Abdul–Malik v. Coombe,* 1996 WL 706914, at *2 (S.D.N.Y. Dec.6, 1996) ("Clearly, the determination of whether [RLUIPA's precursor and constitutional provisions] mandate the provision of a Halal diet for Muslim inmates is a question of law common to all potential class members.")

C. *Rule 23(a)(3)—Typicality*

In *Beattie v. CenturyTel, Inc.,* 511 F.3d 554, 561 (6th Cir.2007), the Sixth Circuit explained Rule 23(a)(3)'s commonality requirement as follows:

> Under Rule 23(a)(3), "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class." A claim is typical if "it arises from the same event or

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practice or course of conduct that gives rise to the claims of other class members, and if his or her claims are based on the same legal theory." In *Sprague,* the Court explained that "[t]ypicality determines whether a sufficient relationship exists between the injury to the named plaintiff and the conduct affecting the class, so that the court may properly attribute a collective nature to the challenged conduct." On the other hand, the *Sprague* Court explained, the typicality requirement is not satisfied when a plaintiff can prove his own claim but not "necessarily have proved anybody's else's claim." Lastly, for the district court to conclude that the typicality requirement is satisfied, "a representative's claim need not always involve the same facts or law, provided there is a common element of fact or law ."

Here, again, the court conducts a separate analysis for each of Plaintiffs' two sets of claims.

i. *Jum'ah* Claims

In considering whether Plaintiffs have met Rule 23(a)(3)'s "typicality" requirement, it is first helpful to focus on the Defendants' perspective. If Defendants' position is correct, then they could, for no reason other than the verbiage in the Work Release Policy, deny any Muslim inmate's request for a work/study release so that he could attend *Jum'ah.* In other words, it is the Policy itself which puts ***all*** inmates' religious-based scheduling requests on equal footing with each other.

***7** Plaintiffs here are challenging the legality of that specific Policy, including the fact that any request to attend *Jum 'ah* is entitled to no more consideration than would be an inmate's request to watch a television program. Work Release Policy, ¶ BB. As a precursor to success, any aggrieved class member would be required to overcome the Policy's facial ban on religious-based "call-outs." Thus, at least at this stage, the Plaintiffs' claims arise from the same "practice or course of conduct that gives rise to the claims of other class members ..." *Beattie,* 511 F.3d at 561. *See also* *Mayweathers,* 258 F.3d at 933.

ii *Halal* Diet Claims

The "typicality" issue in this case is on all fours with the one at issue in *Abdul–Malik,* 1996 WL 706914, at *3. The *Abdul–Malik* court was considering a Muslim plaintiff inmate's motion to certify a class of all "Muslims [who] are now or will be incarcerated in [State of New York correctional facilities" who desire a *halal* diet. *Id.* at *1. The defendant in that case raised almost precisely the same typicality argument that Defendants raise here, *i.e.,* that Plaintiffs "are members of three different faiths" and that "[w]hile all three [ ] share some common beliefs, in practice they may have very different belief systems. It is unclear whether the injunctive relief the individual

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Plaintiffs seek would satisfy the membership of three separate faiths." Doc. # 62 at 3. The *Abdul–Malik* court resoundingly rejected that argument:

> The typicality requirement is satisfied when each class member's claim arises from the same events as give rise to the named representative's claims and each class member will make the same legal arguments to prove liability. The typicality requirement is not defeated by minor variations in the fact patterns of individual class member's claims.
>
> The defendant contends that the plaintiff's claims are not typical of the proposed class because there is no evidence in the record that all Muslims follow the same dietary practices as the plaintiff. He points to the fact that members of the Nation of Islam feel that their religion is distinct from other Muslim sects. The defendant does not, however, contend that members of the Nation of Islam would not follow a Halal diet. Moreover, the defendant does not dispute that a Halal diet is a known dietary practice .... the speculation that some Muslim sects may impose stricter dietary restrictions than those contained in a Halal diet does not render plaintiff atypical of other Muslim inmates.

Abdul–Malik, at *3.

The same rationale compels a finding that Plaintiffs here satisfy Rule 23(a)(3)'s "typicality" requirement. Plaintiffs have narrowly defined a proposed class comprised of "all current and future Michigan Muslim inmates who desire but have been denied ... a halal diet that is free of contamination by foods considered haram." Regardless of the minor dietary differences identified by Defendants (which differences were unsupported, speculative, and lacking in relevance[3]), the class members' claims arise from the same "practice or course of conduct that gives rise to the claims of other class members ..."—the MDOC's policy of not providing *halal* meals to its Muslim inmates. *Beattie,* 511 F.3d at 561. *See also Abdul–Malik,* at*3. Accordingly, the typicality requirement is met as to the *halal* diet claims.

[3] The only particular dietary difference referenced by Defendants is that Nation of Islam members supposedly do not eat meat or potatoes. Doc. # 62 at 3. However, Defendants themselves have taken the position that they meet those inmates' religious dietary needs by providing vegetarian foods that are not contaminated. Thus, unless Defendants are suggesting that the court might order the MDOC to provide those or other inmates with a meat-only or potato-only diet, the Defendants have failed to meaningfully differentiate between the proposed class members' claims in a way that would impact this court's analysis of the typicality question.

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D. ***Rule 23(a)(4)—Fair and Adequate Protection of Class Members' Interests***

***8** Rule 23(a)(4) requires that the that "the representative parties will fairly and adequately protect the interests of the class." That requirement has two components: "(1) the representative must have common interests with unnamed members of the class, and (2) it must appear that the representatives will vigorously prosecute the interests of the class through qualified counsel." *Senter v. General Motors Corp.,* 532 F.2d 511, 525 (6th Cir.1976). There is no dispute that both of those prongs are satisfied here. First, the Defendants do not argue otherwise. Second, the representative Plaintiffs clearly have common interests with the unnamed class members, each of whom (by definition) will be an inmate who desires the accommodations being sought by the current Plaintiffs. Moreover, for the reasons stated above, the claims and issues involved are common and typical to all of the proposed plaintiffs. *Johnson,* 2002 U.S. Dist. LEXIS 12550, at *25–26. Finally, the representative Plaintiffs have personally experienced the alleged burdens imposed by the restrictions they challenge, have testified, and have vigorously pursued this action over a lengthy period of time through qualified counsel, the Dickinson Wright law firm and the ACLU. They have also engaged experts who have provided cogent expert reports in support of their positions. In sum, there is no dispute that Rule 23(a)(4) is satisfied.

E. ***Rule 23(b)(2) is Satisfied***

As noted above, in addition to satisfying the Rule 23(a) criteria, representative plaintiffs must also meet one of the criteria listed in Rule 23(b). Here, Plaintiffs claim they satisfy Rule 23(b)(2), which provides that "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole ..." Fed.R.Civ.P. 23(b)(2). As noted in *Johnson,* 2002 U.S. Dist. LEXIS 12550, at *28:

> [P]rison section 1983 suits involving an allegedly illegal or unconstitutional prison policy are well situated for certification under Rule 23(b)(2) because the plaintiff classes seek to enjoin the operation of the policy and the grounds for relief depend on the general legality or constitutionality of the policy and on the applicability of common defenses to the entire class.

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That is precisely the case here with respect to both Plaintiffs' *Jum'ah* and *halal* diet claims. With respect to each of those claims, the Defendants have adopted a policy—which they believe to be legal—that applies generally to all Muslim inmates seeking the type of relief sought by the Plaintiffs here. Those with a conflicting work or school assignment are prohibited by the Work Release Policy from obtaining a call-out to attend *Jum'ah,* and those seeking a *halal* diet cannot obtain one because the MDOC has a policy of not providing them (Doc. # 55 at 9), or at least a professed financial inability to do so. Because Plaintiffs' case as to each claim rises or falls on the general legality of those respective issues, any final injunctive or declaratory relief given to them will necessarily be "appropriate respecting the class as a whole." Fed.R.Civ.P. 23(b)(2). Accordingly, Plaintiffs here satisfy Rule 23(b)(2).

IV. *CONCLUSION*

***9** For the foregoing reasons, the court **RECOMMENDS** that Representative Plaintiffs' Motion for Class Certification [56] be **GRANTED.**

All Citations

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KeyCite Yellow Flag - Negative Treatment
Distinguished by Unknown Parties v. Johnson, D.Ariz., January 11, 2016

2012 WL 4470433
Only the Westlaw citation is currently available.
United States District Court,
E.D. Michigan,
Northern Division.

Jonathan BROWN, Plaintiff,
v.
CITY OF DETROIT, Defendant.

No. 10–12162.
|
Sept. 27, 2012.

Attorneys and Law Firms

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OPINION AND ORDER GRANTING IN PART AND DENYING IN PART PLAINTIFF'S MOTION FOR CLASS CERTIFICATION AND ORDERING SUPPLEMENTAL BRIEFING ON ISSUES GOVERNING LIABILITY

THOMAS L. LUDINGTON, District Judge.

***1** In June 2012, the Supreme Court granted a writ of certiorari on "Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." *Behrend v. Comcast Corp.*, 655 F.3d 182 (3d Cir.2011), *cert. granted sub nom. Comcast Corp. v. Behrend,* 80 U.S.L.W. 3442 (U.S. Jun 25, 2012) (No. 11–864).

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This case raises a related question—specifically, whether liability may be bifurcated from damages in a class action brought pursuant to Federal Rule of Civil Procedure 23(b)(3). Sixth Circuit precedent authorizes the bifurcation of liability from damages in class actions brought pursuant to Rule 23(b)(3). *E.g.,* *Olden v. LaFarge Corp.,* 203 F.R.D. 254 (E.D.Mich.2001) (Lawson, J.), *aff'd* 383 F.3d 495 (6th Cir.2004); *see also* Fed.R.Civ.P. (c)(4) ("When appropriate, an action may be brought or maintained as a class action with respect to particular issues."). Accordingly, the question presented is answered in the affirmative.

The case arises out of the manner that Defendant City of Detroit allegedly treats those arrested within the city. Plaintiff Jonathan Aaron Brown, asserting § 1983 claims individually and on behalf of tens of thousands of others, filed suit alleging that Defendant routinely violates the constitutional rights of arrestees three distinct ways. First, Defendant does not provide bedding when an arrestee is detained overnight or for more than sixteen hours. Second, Defendant regularly detains arrestees for more than forty-eight hours without a judicial determination of probable cause. And third, Defendant does not feed arrestees at least two meals a day. Plaintiff estimates the size of the proposed "Class I" is about 108,000. "Class II" is about 30,000. And Class III, Plaintiff acknowledges, has not been determined.

Plaintiff filed this suit in June 2010. Over the next several months Defendant did not respond to discovery demands, notwithstanding two court orders compelling their production. Accordingly, in April 2011 the Court entered an order of default against Defendant. ECF No. 27. Since then, the parties have filed two rounds of supplemental briefing on whether damages and liability may be bifurcated, whether class certification is appropriate, and whether the default runs to the putative classes or is limited to Plaintiff's individual claims.

As detailed below, the first two proposed classes will be certified. The third will not be. Damages and liability will be bifurcated. Default will run to the putative classes. And supplemental briefing will be ordered on whether the allegations in the complaint for the first two classes state a valid cause of action.

Briefly, once liability is bifurcated from damages, establishing Defendants' liability does not merely involve common questions of fact and law for the first two proposed classes—it depends on them. To establish municipal liability under "inaction theory," the first element Plaintiff must prove is "the existence of a clear and persistent pattern of violating federal rights." *Powers v. Hamilton Cnty. Pub. Defender Comm'n,* 501 F.3d 592, 607 (6th Cir.2007). Consequently, the individual facts particular to each member's claim are the material facts essential to the claim common to all.

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***2** Moreover, the Supreme Court instructs that the primary purpose of class actions is the "vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 617, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (internal quotation marks omitted) (quoting Benjamin Kaplan, *A Prefatory Note,* 10 B.C. Ind. & Com. L.Rev. 497, 497 (1969)). "The policy at the very core of the class action mechanism," the Court explains, "is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." *Amchem,* 521 U.S. at 617 (quoting *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (1997)). This case thus presents a quintessential case for class action, the accusation of a serious, ongoing problem that is unlikely to be remedied by an individual plaintiff because of the relatively modest damages.

The Court will certify the first two classes as to liability. But as Plaintiff has not provided sufficient detail regarding the third proposed class, the Court will decline to certify the class at this time.

Additionally, the Court will order supplemental briefing on the issue of whether the allegations in the complaint for the first two classes state a valid cause of action. "The effect of a default," as a matter of the black letter law, "is to deem admitted all the well-pleaded facts in the complaint." 49 C.J.S. *Judgments* § 273 (2012). A default does not, however, deem admitted legal conclusions. *Id.* Here, when default was entered in April 2011, its scope extended to "all the well-pleaded facts in the complaint." *Id.* And the factual allegations in the complaint are not limited to Plaintiff. They extend to the three proposed classes as well. The scope of the default thus extends to these classes. This does not mean, however, that Defendant is liable to each of the three classes. Defendant may still challenge the legal conclusions in the complaint, such as the allegation that depriving bedding to an arrestee held for sixteen hours constitutes a constitutional tort. Accordingly, before deciding Defendant's liability, the Court will direct the parties to brief the legal issues pertinent to the first two classes.

I

A

On June 1, 2010, Plaintiff filed a complaint in this Court. The complaint asserts that Plaintiff was arrested by the Detroit Police Department at 10:00 a.m. on September 21, 2007, and detained in a cold, isolated holding cell without proper food, blankets, or a pillow for fifty-five hours before

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being arraigned. The complaint further alleges that Defendant has treated tens of thousands of other arrestees in a similar manner since May 2007. Accordingly, the complaint seeks class certification for three classes of persons.

***3** Class I is defined in the complaint as "All persons detained in a [Detroit Police Department] lock-up or detective division facility overnight or for more than sixteen hours in a 24–hour period at any time from May 27, 2007 to the present." Compl. ¶ 38. The complaint contends that these arrestees were subjected to "inhumane conditions of confinement" as Defendant "maintains no bedding and no facilities to allow arrestees to get meaningful sleep, i.e., no beds, cots, mattresses, blankets or pillows." *Id.* ¶ 38(d); *see id.* ¶¶ 17–23.

Class II is defined as "All persons detained by the DPD in excess of 48 hours without a judicial determination of probable cause at anytime from May 27, 2007 until the present." *Id.* ¶ 43. As noted, the complaint alleges that Defendant has "an ingrained and long standing practice of detaining arrestees for more than forty-eight hours without a judicial determination of probable cause." *Id.* ¶ 44(e). The complaint further asserts: "An analysis of the sample data obtained by the consent decree monitor indicates that during the reporting periods in 2008 and 2009, between 18 and 34 percent of arrestees were detained in excess of 48 hours by the [Detroit Police Department] without a judicial determination of probable cause." *Id.* ¶ 44(f).

Elaborating on the basis for certification of this class, paragraph 46 identifies four "questions of law and fact common to the claims of Class II." The first is "Whether it violates the constitution to detain arrestees in excess of 48 hours without obtaining judicial approval of probable cause for the detention." Compl. ¶ 46(a). The second is "Whether it violates state law to detain arrestees in excess of 48 hours without obtaining judicial approval of probable cause for the detention." *Id.* ¶ 46(b). The third is "Whether the [Detroit Police Department] maintained a policy, custom and/or widespread practice allowing the detention of arrestees in excess of 48 hours without obtaining a judicial determination of probable cause for the detention." *Id.* ¶ 46(c). And the fourth is "Whether [department] officials have been deliberately indifferent to the need for training, enforcement, discipline, and/or better policies regarding the length of detention of arrestees in the absence of a judicial determination of probable cause." *Id.* ¶ 46(d).

Class III is defined in the complaint as "All persons detained by the [City of Detroit Police Department] in excess of 24 hours [who] did not receive at least two meals at any time from May 27, 2007 to the present." *Id.* ¶ 50. Paragraph 51 elaborates: "The [department] maintains or maintained a policy, custom and/or widespread practice permitting officers to detain citizens in excess of 24 hours without feeding them."

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B

Defendant was served and timely answered in June 2010. ECF Nos. 10, 11. In August 2010, the Court entered a scheduling order. ECF No. 13. It set deadlines for discovery and dispositive motions. It also scheduled the pretrial conference and trial. In September 2010, Plaintiff moved to compel discovery responses. ECF No. 14. Plaintiff explained that he had requested a database of all persons arrested by the Detroit Police Department during the class period. Defendant produced a four-page document regarding Plaintiff's arrest, nothing else. Plaintiff's motion to compel was granted. ECF No. 18. Still, Defendant did not respond to the discovery requests. In November 2010, Plaintiff moved to enforce the order granting Plaintiff's motion to compel. ECF No. 19. The following month, a stipulated order was entered granting Plaintiff's motion. ECF No. 24.

***4** Again, Defendant did not produce the discovery as ordered. In March 2011, Plaintiff moved for sanctions. ECF No. 25. On April 18, 2011, the Court—noting that there had been nine months of unexplained agreements to produce voluminous documents followed by neglect and inattention by Defendant—granted Plaintiff's motion and entered a default against Defendant. ECF No. 27. In entering the order, the Court emphasized that Defendant repeatedly missed discovery deadlines agreed to by the parties and ignored the Court's orders. Indeed, by the time the Court entered the default, Defendant had stopped speaking to Plaintiff's attorneys, responding to Plaintiff's written inquiries, and appearing for Court-ordered hearings.

The day after the default was entered, Defendant moved to set it aside. ECF No. 29. The Court, finding that Defendant had not demonstrated good cause for setting aside the default, denied the motion in May 2011. ECF No. 33. The Court noted, however, that the default was as to liability only. Whether class certification is appropriate in this case, the Court observed, was not resolved by the default.

C

To begin to focus attention on whether class certification is appropriate, on May 31, 2011, the Court held a status conference. Following the conference, an order was entered setting a briefing schedule on two issues. ECF No. 38. First, Defendant was directed to brief all of the reasons it believes that the detention of some persons for more than forty-eight hours following their arrests without a judicial determination of probable cause complied with the Fourth Amendment as interpreted by *County of Riverside v. McLaughlin,* 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991), and

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progeny. Plaintiff was directed to respond and to brief the interplay between municipal liability under 42 U.S.C. § 1983 (as defined in *Monell v. Department of Social Services,* 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), and progeny) and Plaintiff's burden under Rule 23 of demonstrating that class certification is appropriate.

Defendant timely filed a brief identifying several exceptions to the forty-eight hour presumption established by *McLaughlin,* including: (1) "terrorist acts (or bomb threats)"; (2) "extreme weather (floods, snow storms, etc.)"; (3) "power outage"; (4) "illness of detainee"; (5) "mental state of detainee (unable to understand process)"; and (6) "false I.D. given by detainee." Def .' s Mem. on Permissible Exceptions 3, ECF No. 39.

Plaintiff then filed a response brief. ECF No. 44. He asserted that "none of these defenses, even if legally valid, would defeat Rule 23(b)(3) class certification because each of them can be handled ministerially." Pl.'s Resp. to Def.'s Mem. on Permissible Exceptions 2, ECF No. 44. Illustrating the argument, Plaintiff explained: "Take, for example, an arrestee's illness—a matter that may constitute an 'extraordinary circumstance' under *McLaughlin.* If an arrestee is sick while in custody, the Department checks a box indicating so on the arrest report at the time of booking. Because there is an arrest report for each detainee, parties can determine the universe of people to whom this circumstance even arguably applies." *Id.* If there are only a handful of class members fitting within this exception, Plaintiff elaborated, "then these individualized determinations would not predominate over the common determination of the City's *Monell* liability for holding class members longer than 48–hours." *Id.*

***5** Turning to the interplay between municipal liability under *Monell* and class certification, Plaintiff asserted that "it has become well-accepted that the common factual questions in proving a *Monell* claim usually predominate. As a result, courts generally certify *Monell* claims for class treatment even when there may be some individualized defenses." *Id.* at 3 (citing *Powers v. Hamilton Cnty. Pub. Defender Comm'n,* 501 F.3d 592, 619 (6th Cir.2007)). Plaintiff further noted that in two cases, district courts certified Rule 23(b)(3) class actions based on a municipality's policy of not arraigning or releasing arrestees within forty-eight hours. Pl.'s Resp. 4 (citing *Strunk v. LaGrange Cnty. Sheriff,* No. 10–CV–23, 2011 WL 839662, at *1 (N.D.Ind. March 7, 2011); and *Dunn v. City of Chicago,* 231 F.R.D. 367, 375 (N.D.Ill. Oct.5, 2005)).

Defendant timely filed a reply memorandum. ECF No. 46. "It is not clear what Plaintiff means by 'handled ministerially,' " Defendant wrote, elaborating: "It is clear that with respect to the legal defenses available regarding each putative class member there are several questions of fact on the liability issues, as well as numerous individual damage questions of fact. The unique nature of

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each member[']s case means that these claims cannot be handled on a class basis." Def.'s Reply to Pl.'s Resp. 2. Defendant concluded: "The simple truth is that in the Sixth Circuit *Monell* civil rights litigation is not normally certified under Rule 23(b)(3) because of the 'predominance' requirement of that rule, which requires that common questions of law and fact 'predominate' over individual ones." *Id.* at 9.

D

In November 2011, a status conference was held. Shortly before the conference, Plaintiff submitted a status report on the potential size of the three proposed classes. ECF No. 53. Plaintiff estimated the size of Class I is about 108,000, Class II is about 30,000, and Class III had not been determined.

To calculate the size of the classes, Plaintiff explained, he reviewed three of Defendant's databases: LiveScan, Crisnet, and the warrant tracking form database. LiveScan contains "uniform fields of information for all person[s] that the [Detroit Police Department] arrests, including biographical and arrest information. From June 1, 2007 to July 31, 2011, the LiveScan database contains 142,143 valid records." Pl.'s Report on Potential Size of Class 1, ECF No. 53. Crisnet contains information for all persons the department "encounters," and, if the encounter results in an arrest, "the record contains a detailed description of the events that transpired, including whether a warrant was issued prior to the arrest.... From June 1, 2007 to July 31, 2011, the Crisnet database contains 298,399 records." *Id.* at 2–3. The warrant tracking form database, which contains "the only evidence the [Detroit Police Department] maintains as to why an individual did not get to see a judge for more than 48 hours after arrest," has just 4,173 records. *Id.* at 3. Plaintiff specified that he found:

***6** • For Class I, Defendant's databases contained "107,609 records where an individual was detained between 10 p.m. and 6 a.m. or for more than 16 hours."

• For Class II, Defendant's databases showed "there were 37,064 arrests which lead to detentions longer than 48 hours.... Of the 37,064 arrests where the length of detention exceeded 48 hours, 79.4% were warrantless arrests. The estimated size for Class II is 29, 431."

• For Class III, Defendant did not maintain an electronic record, and so Plaintiff had not yet determined the size of the potential class. Plaintiff explained: "The meal logs are only available in paper format and have not been data entered electronically yet. As such, this analysis is limited to the length of detention criteria and the estimated class size is overly

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> inclusive. With that understanding, the LiveScan database identifies 83,808 records where an arrestee was detained over 24 hours."

Pl.'s Report on Potential Size of Class 2, 3, 4–5, ECF No. 53.

Plaintiff also elaborated regarding Defendant's affirmative defenses to Class II. Plaintiff first noted that the warrant tracking form database ("the only evidence the DPD maintains as to why an individual did not get to see a judge for more than 48 hours after arrest") contained 4,173 records. *Id.* at 3. After reviewing 30 percent of these records, Plaintiff extrapolated that for the potential class of about 30,000 "there are likely to be only 200 records at issue." *Id.* at 4.

In February 2012, another status conference was held. Plaintiff again submitted a status report. ECF No. 55. Plaintiff explained that he had had significantly overestimated the number of Class II members for whom Defendant had an affirmative defense. "After reviewing the relevant records from the Warrant Tracking Form database," Plaintiff elaborated, "[he] identified a total of 110 records which fit in one of Defendant's affirmative defenses." Pl.'s Report on Number of Individuals Affected by Affirmative Defenses 2, ECF No. 55. Thus, Defendant had affirmative defenses for less than 0.5 percent of the potential Class II members.

Acknowledging that Defendant disagreed regarding whether the 110 records form a complete list of potential class members subject to an affirmative defense, Plaintiff continued: "Defendant has no good-faith basis to take this position. First, the City has made no showing that any other evidence exists. Second, the Defendant, through its Rule 30(b)(6) representative, admitted that when an exigent circumstance exists to justify the judicial review violation, it is always documented on a Warrant Tracking Form." *Id.* (citing Romeo Dep. 97:3–7, Sept. 29, 2012). Additionally, Plaintiff reiterated his assertion that the proffered affirmative defenses do not "overshadow" the common factual and legal questions for Class II: "Each putative class member seeks recovery under the same legal theories and must prove the same policies and practices by the Defendant." *Id.* at 4.

E

***7** Following the status conference, an order was entered directing supplemental briefing on Plaintiff's pending motion for class certification and entry of default in favor of the class.

Plaintiff filed a supplemental brief in April 2012 asserting that Class II should be certified for "two independently sufficient reasons. First, Defendant forfeited any *Riverside* justification defense by

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incurring the default. And, second, even if the Court did allow Defendant to assert a *Riverside* defense, the defense involves only a handful of categorical justifications, which can be excluded from the class definition." Pl.'s Supp. Mem. on Class Certification 3, ECF No. 57 (internal citations omitted). Elaborating on the first argument, Plaintiff wrote: "Defendant delayed in discovery, violated court orders, and ultimately defaulted. Its affirmative defenses are waived." *Id.* at 8.

Addressing the scope of Defendant's default, Plaintiff asserted that because a default deems admitted all the factual allegations in the complaint, liability extends to the entire class. "The order applied to the entire complaint," Plaintiff wrote, "which included the claims brought on behalf of the classes. It did not parse the named Plaintiff from the claims he brought for himself and the absent class members." *Id.* at 8–9.

Plaintiff further asserted that default as to liability is appropriate for the Class I claim because it states a valid cause of action. Plaintiff wrote that "numerous courts have found that withholding bedding as a matter of course ... violates the Fourteenth Amendment." *Id.* at 11 (citing *Thompson v. City of L.A.,* 885 F.2d 1439 (9th Cir.1989); *Anela v. City of Wildwood,* 790 F.2d 1063 (3d Cir.1986)). Likewise, Plaintiff continued, default as to liability is appropriate for Class II since "[a]ll the class needs to prove to meet their burden to establish a *Riverside* violation is the fact that they were held longer than 48–hours without judicial approval." *Id.* at 12. Finally, "Even less analysis is needed to establish the viability of Class III's claim." *Id.* at 11. By defaulting, "Defendant admits that it did not provide minimally adequate food to the persons meeting the definition of Class III." *Id.* at 12.

Defendant responded on June 5, 2012. ECF No. 58. Defendant first argued that not only should the default not extend to the entire class, the default as to Plaintiff should be set aside. Defendant wrote: "Plaintiff (who waited for three years before filing this suit) will not suffer significant prejudice by setting aside the default and continuing this litigation on the merits." Def.'s Supp. Br. Opp'n to Class Certification 7, ECF No. 58. Defendant continued: "The named Plaintiff cites no authority for the proposition that (there being no class certification) he has standing to pursue a default or default judgment or any other legal action on behalf of unidentified individuals who may or may not become class members.... A default judgment on their behalf would also be inappropriate inasmuch as the reason for the default judgment (a failure to timely provide discovery) no longer exists and the future members of the class (if certified) have suffered no actual prejudice." *Id.* at 10.

***8** Turning to the class certification issue, Defendant asserted that Class II should not be certified because Plaintiff has not established commonality. Specifically, Defendant asserted, "mini-trials would be necessary to determine (from actual testimony from both parties and not simply records) ... what did and did not occur and why. In addition to the subjective and individual

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damages allegedly suffered it would have to be determined in each excessive detention, whether a policy existed which was the moving force behind said detention, or if that detention was simply a one out of 500 clerical or other isolate[d] error." *Id.* at 11. In support, Defendant cited *Wal–Mart Stores, Inc. v. Dukes,* —— U.S. ——, 131 S.Ct. 2541, 180 L.Ed.2d 374 (2011), and *Alkire v. Irving,* 330 F.3d 802 (6th Cir.2003).

Two weeks later, Plaintiff replied. ECF No. 59. Defendant is not entitled to have the default set aside, Plaintiff wrote, because the request is time-barred under the Federal Rules of Civil Procedure. Noting that the Court denied Defendant's request to set aside the default in May 2011, and Defendant's present request was made in June 2012, Plaintiff observed that "requests for relief under Rule 60(b)(1) must be presented within one year after the entry of the order." Pl.'s Reply Supp. Mot. for Class Certification 2, ECF No. 59.

Addressing the class certification issue, Plaintiff argued Defendant's reliance on *Wal–Mart* and *Alkire* was misplaced. Plaintiff argued that the Court rejected class certification in *Wal–Mart* because "there was no proof that *every* Wal-mart store in the nation operated under a common standard for promotions and new hires." *Id.* at 5. In contrast, Plaintiff continued, "the evidence in this case shows common practices applied throughout all police districts that result in the violation of the putative class members' constitutional rights. For example, the warrant tracking form database shows that time and time again, regardless of district, warrantless arrestees are held over 48 hours without a probable cause hearing due to sloppy report writing." *Id.* at 5–6.

II

Two primary issues are now before the Court. First, is Plaintiff entitled to class certification? And second, is Defendant in default as to the entire class?

These two questions must be addressed in this order because absent class certification, no default as to the (nonexistent) class can be made. *Davis v. Hutchins,* 321 F.3d 641, 648–49 (7th Cir.2003). Notwithstanding the "the general principle that factual allegations in the complaint are deemed admitted by the defendant upon default," the Seventh Circuit observes: "Rule 23(c) imposes an independent duty on the district court to determine by order that the requirements of Rule 23(a) are met regardless of the defendant's admissions." *Id.* at 648–49. "Allowing certification by default or because the defendant has admitted that the class exists, with no independent analysis or determination by the district judge, would remove this important protection," the court further

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admonishes. *Id.* at 649; *see also Partington v. Am. Int'l Specialty Lines Ins. Co.*, 443 F.3d 334, 341 (4th Cir.2006) ("In addition, the Seventh Circuit—the only circuit to address the question of implicit certification in the context of a default judgment—refused to allow it. We agree with its reasoning that although a default judgment has the effect of deeming all factual allegations in the complaint admitted, it does not also have the effect of "admitting" the independent legal question of class certification.").

***9** Accordingly, the class certification issue is addressed first, the scope of the default second.

A

Rule 23 requires a two-stage analysis for determining whether class certification is appropriate. At stage (a), the plaintiff must establish four elements—numerosity, commonality, typicality, and adequacy of representation. Subsection (a) of Rule 23 provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> (1) the class is so numerous that joinder of all members is impracticable;
>
> (2) there are questions of law or fact common to the class;
>
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> (4) the representative parties will fairly and adequately protect the interests of the class.

Fed.R.Civ.P. 23(a); *see generally* *Powers v. Hamilton Cnty. Pub. Defender Comm'n*, 501 F.3d 592, 617 (6th Cir.2007).

At stage (b), the plaintiff must satisfy the requirements of one of the types of class actions set forth in Rule 23(b). Here, Plaintiff moves for certification under the "predominance" subsection set forth in subsection (b)(3), which requires "that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b) (3); *see generally* *Powers*, 501 F.3d at 617.

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The analysis of a plaintiff's compliance with the requirements of Rule 23 is "rigorous." *Wal–Mart Stores, Inc. v. Dukes,* —— U.S. ——, ——, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011). "Rule 23," the Supreme Court instructs, "does not set forth a mere pleading standard. A party seeking class certification must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Id.* (emphasis in original). Moreover, a class can be certified "only if the trial court is satisfied, after a rigorous analysis, that the prerequisites of Rule 23(a) have been satisfied. Frequently that 'rigorous analysis' will entail some overlap with the merits of the plaintiff's underlying claim. That cannot be helped." *Id.* (citations and internal quotation marks omitted) (quoting *Gen. Tel. Co. of S.W. v. Falcon,* 457 U.S. 147, 160, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)).

Here, Plaintiff seeks to have three classes certified. Each is addressed in turn.

1

Plaintiff first seeks to certify a class of about one hundred thousand people detained between 10 p.m. and 6 a.m. or for more than sixteen hours without bedding. As this class satisfies the requirements of Rule 23(a) and (b)(3), the Court will certify it.

a

First, the class is sufficiently numerous to make joinder "impracticable." Fed.R.Civ.P. 23(a)(1); *see generally* 32B Am.Jur.2d Fed. Courts *When Joinder is Impracticable* § 1608 (2012). Impracticability is not impossibility—rather, "class representatives must demonstrate only that 'common sense' suggests that it would be difficult or inconvenient to join all class members ." *Varacallo v. Mass. Mut. Life Ins. Co.,* 226 F.R.D. 207, 229 (D.N.J.2005) (quoting *In re the Prudential Ins. Co. of Am.,* 962 F.Supp. 450, 495, 510 (D.N.J.1997)); *see Beattie v. CenturyTel, Inc.,* 234 F.R.D. 160, 168 (E.D.Mich.2006) ("Where the exact size of the class is unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied."), *aff'd* 511 F.3d 554 (6th Cir.2007).

***10** "There is no specific number below which class action relief is automatically precluded," the Sixth Circuit notes, elaborating: "Impracticability of joinder is not determined according to a strict

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numerical test but upon the circumstances surrounding the case." *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 523 n. 24 (1976); *cf.* *Flood v. Dominguez,* 270 F.R.D. 413, 417 (N.D.Ind.2010) ("Generally speaking, when the putative class consists of more than 40 members, numerosity is met, but there is nothing magical about that number."). Common sense suggests that the joinder of more than a hundred thousand people is not practicable.

b

Second, the class shares common issues of fact and law. Commonality, as noted, requires a plaintiff demonstrate that "there are questions of law or fact common to the class." Fed.R.Civ.P. 23(a)(2). "That language is easy to misread," the Supreme Court cautions, "since any competently crafted class complaint literally raises common questions." *Wal–Mart,* 131 S.Ct. at 2551 (internal alterations and quotation marks omitted) (quoting Richard Nagareda, *Class Certification in the Age of Aggregate Proof,* 84 N.Y.U. L.Rev. 97, 131–132 (2009)). In *Wal–Mart,* for example, ostensibly common questions included "Do all of us plaintiffs indeed work for Wal–Mart? Do our managers have discretion over pay? Is that an unlawful employment practice?" *Id.* These types of questions were insufficient, the Court observed, as commonality does not mean that the class members "have all suffered a violation of the same provision of law," but that they "have suffered the same injury." *Id.* (quoting *Gen. Tel. Co. of S.W. v. Falcon,* 457 U.S. 147, 157, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)). Put differently, the common issue must involve—indeed, in fact resolve—an essential element of the class members' claim:

> Their claims must depend upon a common contention—for example, the assertion of discriminatory bias on the part of the same supervisor. That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Wal–Mart, 131 S.Ct. at 2551. The Sixth Circuit similarly notes: "Cases alleging a single course of wrongful conduct are particularly well-suited to class certification." *Powers v. Hamilton Cnty. Pub. Defender Comm'n,* 501 F.3d 592, 619 (6th Cir.2007) (citing *Sterling v. Velsicol Chem. Corp.,* 855 F.2d 1188, 1197 (6th Cir.1988)).

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In *Wal–Mart,* the plaintiffs sought to certify a class action on behalf of all Wal–Mart's female employees alleging a "pattern or practice" of sex discrimination in violation of Title VII. The theory of the case was "that a strong and uniform 'corporate culture' permits bias against women to infect, perhaps subconsciously, the discretionary decisionmaking of each one of Wal–Mart's thousands of managers." 131 S.Ct. at 2548. The Court concluded that the plaintiffs had not established commonality, explaining that "in resolving an individual's Title VII claim, the crux of the inquiry is 'the reason for a particular employment decision.' " *Id.* at 2252 (quoting *Cooper v. Fed. Reserve Bank of Richmond,* 467 U.S. 867, 876, 104 S.Ct. 2794, 81 L.Ed.2d 718 (1984)). The plaintiffs, however, had no common contention that would "produce a common answer to the crucial question *why was I disfavored.*" *Wal–Mart,* 131 S.Ct. at 2552 (emphasis in original). Rejecting the plaintiffs' theory that the "social framework" of Wal–Mart rendered it "vulnerable to gender bias," the Court noted that the plaintiffs had no evidence regarding what percentage of the employment decisions were made because of "stereotyped thinking." *Id.* The plaintiffs' expert, for example, "conceded that he could not calculate whether 0.5 percent or 95 percent of the employment decisions at Wal–Mart might be determined by stereotyped thinking." *Id.* Thus, the Court held, the plaintiffs had not established a common pattern or practice.

***11** In *Powers v. Hamilton County Public Defender Commission,* 501 F.3d 592 (6th Cir.2007), in contrast, the Sixth Circuit upheld the class certification based on the allegation that the local public defender's office "had a well-settled custom or policy of not asking for an indigency hearing before a probationer is incarcerated for failure to pay a fine." *Id.* at 598. Specifically, the plaintiff produced evidence suggesting that "staff members of the Public Defender never ask for an indigency hearing" and, moreover, the defendant was unable to produce "any evidence showing that indigency hearings are ever requested." *Powers v. Hamilton Cnty. Pub. Defender Comm'n,* No. 1) 02–CV–00605, 2005 WL 2033696, at *5 (S.D.Ohio Aug.23, 2005), *aff'd* 501 F.3d 592 (6th Cir.2007). The Sixth Circuit explained that the commonality requirement was met because the plaintiff alleged a "regular practice" causing constitutional injury:

> Powers has alleged that the Public Defender engaged in an ongoing and regular practice of failing to seek indigency hearings for criminal defendants facing incarceration for non-payment of fines. Powers has asserted a single factual theory of wrongdoing and seeks to recover based on the single legal claim that the Public Defender's practice violated class members' due process rights. The dispositive facts and law are the same as to each class member. This is sufficient to satisfy both the commonality and predominance requirements.

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Id. at 619 (citing *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir.1988)).

In this case, Defendant does not dispute the fact that each member of the putative class was detained overnight or for more than sixteen hours without bedding. The reason that they did not receive bedding, Defendant again acknowledges, is because Defendant "maintains no bedding and no facilities to allow arrestees to get meaningful sleep, i.e., no beds, cots, mattresses, blankets or pillows." Compl. ¶ 38(d).

Legally, the question of whether this is a cognizable constitutional injury is the same for each of the putative class members. As in *Powers,* the dispositive facts and law are the same as to each class member. [1] Plaintiff has established the commonality required by Rule 23(a)(2).

[1] This should not be interpreted to mean that Plaintiff is correct as a substantive matter that being detained overnight or for more than sixteen hours without bedding alleges a cognizable constitutional injury. The substantive question is addressed in the discussion of the scope of the default.

c

Plaintiff has likewise established typicality required by Rule 23(a)(3). Conceptually, typicality and commonality may be distinct. As a practical matter, however, they "tend to merge." *Gen. Tel. Co. of S.W. v. Falcon,* 457 U.S. 147, 158 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982); *see generally* *Rosario v. Livaditis,* 963 F.2d 1013, 1018 (7th Cir.1992) ("The question of typicality in Rule 23(a)(3) is closely related to the preceding question of commonality.").

The purpose of the requirement, the Court explains, is a screening mechanism "for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *Falcon,* 457 U.S. at 158 n. 13.

***12** Here, Plaintiff's alleged constitutional injury is typical of the class: he was detained for a substantial period of time without bedding. Plaintiff has established the commonality required by Rule 23(a)(3).

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d

Finally, Plaintiff has established that he "will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). This requirement again "tends to merge with the commonality and typicality criteria of Rule 23(a)." *Amchem Prods. ., Inc. v. Windsor,* 521 U.S. 591, 626 n. 20, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997) (internal quotation mark omitted) (quoting *Falcon,* 457 U.S. at 158 n. 13).

The purpose of the requirement, the Court explains, is "to uncover conflicts of interest between named parties and the class they seek to represent." *Id.* at 625 (citing *Falcon,* 457 U.S. at 157–58); *see generally* Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, *Federal Practice and Procedure* § 1768 (3d ed. 2005) ("It is axiomatic that a putative representative cannot adequately protect the class if his interests are antagonistic to or in conflict with the objectives of those he purports to represent."); Richard Posner, *Economic Analysis of Law* 586 (6th ed.2003) (discussing incentives in class actions for the plaintiffs' counsel and the defendant). The Sixth Circuit therefore holds that "to satisfy the adequate representation requirements under Rule 23 ... there must be an absence of a conflict of interest, and the presence of common interests and injury." *Rutherford v. City of Cleveland,* 137 F.3d 905, 909 (6th Cir.1998).

Here, there is no evidence a conflict of interest and, conversely, substantial evidence of vigorous prosecution. Put simply, the incentives of the class members are aligned with each other and with Plaintiff's counsel: maximizing recovery. Moreover, this is not the first large class action that counsel for Plaintiff has brought on behalf of arrestees. *See, e.g.,* *Dunn v. City of Chicago,* 231 F.R.D. 367 (N.D.Ill.2005). Plaintiff has established the adequacy of representation required by Rule 23(a) (4).

e

Finally, the common questions pertinent to Class I "predominate over any questions affecting only individual members" and a class action is a superior vehicle "for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b)(3).

To establish predominance, the plaintiff must demonstrate that "the issues in the class action that are subject to generalized proof, and thus applicable to the class as a whole, predominate over those

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issues that are subject only to individualized proof." *Beattie v. CenturyTel, Inc.*, 511 F.3d 554, 564 (6th Cir.2007) (quotation marks omitted) (quoting *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 136 (2d Cir.2001)); *see generally* Wright, Miller, and Kane, *supra,* at § 1778 (observing "that it is not sufficient that common questions merely exist, as is true for purposes of Rule 23(a)(2), and that the court is under a duty to evaluate the relationship between the common and individual issues in all actions under Rule 23(b)(3)" (footnotes omitted)).

***13** The Supreme Court explains that the "predominance inquiry tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Amchem Prods., Inc. v. Windsor,* 521 U.S. 591, 623, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). In Windsor, the Court looked to the advisory committee notes for guidance regarding the requirement's purpose, finding: "the Advisory Committee had dominantly in mind vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all." *Id.* at 617 (internal quotation marks omitted) (quoting Benjamin Kaplan, *A Prefatory Note,* 10 B.C. Ind. & Com. L.Rev. 497, 497 (1969)).

In this case, whether Defendant denies bedding to arrestees is subject to generalized proof. Likewise, as Defendant concedes that the answer to this is a categorical "yes," whether this deprivation for those held overnight or for more than sixteen hours is a cognizable constitutional injury is likewise subject to generalized proof.

To elaborate on this second point, "in determining whether particular restrictions and conditions accompanying pretrial detention amount to punishment in the constitutional sense of that word," the Supreme Court instructs, the court must evaluate whether the deprivation "is imposed for the purpose of punishment or whether it is but an incident of some other legitimate governmental purpose." *Bell v. Wolfish,* 441 U.S. 520, 538, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) (citing *Flemming v. Nestor,* 363 U.S. 603, 613–17, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960)). The Court continues: "Absent a showing of an expressed intent to punish on the part of detention facility officials, that determination generally will turn on whether an alternative purpose to which [the deprivation] may rationally be connected is assignable for it, and whether it appears excessive in relation to the alternative purpose assigned to it." *Wolfish,* 441 U.S. at 538 (internal alteration and quotation marks omitted) (quoting *Kennedy v. Mendoza–Martinez,* 372 U.S. 144, 168–69, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963)).

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In this case, because Defendant has a uniform policy of not providing bedding, evaluating what Defendant's purpose is and whether the deprivation is excessive in relation to that purpose is subject to generalized proof.

Moreover, the likely recoveries (small) do not provide a sufficient incentive for an individual to bring a solo action. A class action solves this problem by aggregating the relatively paltry potential recoveries into something of sufficient value to attract an attorney's services, while also providing an incentive for correcting a pattern of alleged constitutional violations. The Court will certify Class I.

2

Class II presents a somewhat closer question. Plaintiff seeks to certify a class of about 30,000 people detained for forty-eight hours or more without a judicial finding of probable cause. (This comprises about 20 percent of the total arrestees during the relevant period.[2]) Again, however, the Court will certify the class.

[2] From June 1, 2007 to July 31, 2011, Plaintiff reports, the Detroit Police Department made 142,143 arrests (an atypic figure for a city of 700,000). Of the 37,064 arrests where the length of detention exceeded 48 hours, 79.4 percent were warrantless arrests. After excluding the 100 for which a *Riverside* defense applied, the estimated size for Class II is 29,300.

a

***14** First, the class is sufficiently numerous to make joinder "impracticable." Fed.R.Civ.P. 23(a)(1). As detailed above, numerosity is not a bright-line rule, but a common sense standard. *Senter v. Gen. Motors Corp.*, 532 F.2d 511, 523 n. 24 (1976). Joining nearly thirty thousand persons may not be impossible, but it is certainly impracticable. Plaintiff has established the numerosity required by Rule 23(a)(1).

b

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Second, Plaintiff has established the commonality required by Rule 23(a)(2). To establish municipal liability under an "inaction theory," the first element that a plaintiff must prove is "the existence of a clear and persistent pattern of violating federal rights." *Powers v. Hamilton Cnty. Pub. Defender Comm'n,* 501 F.3d 592, 607 (6th Cir.2007). Plaintiff not only can, but must, point to a common contention to produce a common answer to this question: about 20 percent of the total warrantless detentions resulted in constitutional violations.

Consequently, this case is the analytical flipside of *Wal–Mart.* There, the class members had to each individually "answer the crucial question *why was I disfavored.*" *Wal–Mart Stores, Inc. v. Dukes,* —— U.S. ——, ——, 131 S.Ct. 2541, 2552, 180 L.Ed.2d 374 (2011) (emphasis in original). Class certification was inappropriate because they had no common answer to this common question. Here, the crucial question is whether Defendant had a "clear and persistent pattern of violating federal rights." *Powers,* 501 F.3d at 607. The focus is not the individual violation ("why was I disfavored?"), but the pattern of violations. Thus, unlike in *Wal–Mart,* the dispositive facts and law are common to the class. Plaintiff has established the commonality required by Rule 23(a)(2).

Reinforcing this conclusion are the decisions of the district courts in Illinois and Indiana. In *Dunn v. City of Chicago,* 231 F.R.D. 367 (N.D.Ill.2005), the plaintiffs' claim focused on a "well-established and widespread practice within the [Chicago Police Department] of using unlawfully long detentions." *Id.* at 375. Defendant opposed class certification, asserting "the case law establishes valid exceptions to the 48 hour rule, and thus it may have other defenses to some class members' claims." *Id.* Concluding common questions were not only present, but predominated, the court explained:

> As plaintiffs point out, such an exception is inherently unusual, and thus would apply to no more than a handful of identifiable class members. In other words, the common predominant issues cannot be ignored in favor of the existence of a handful of extraordinary circumstances.... Moreover, the existence of individualized defenses does not preclude class certification.... Indeed, [*County of Riverside v. McLaughlin,* 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991)] was a class action.

Id. at 375–76 (footnote and citations omitted).

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Likewise, in *Strunk v. LaGrange County Sherriff,* No. 1:10–cv–23, 2011 WL 839662 (N.D.Ind. Mar.7, 2011), the court concluded that common questions predominated. The plaintiffs alleged that 239 of the 261 arrestees during the relevant period were detained for more than forty-eight hours. "The primary, and likely dispositive issue involved in this case," the court wrote, "the constitutionality of the jail's detention length prior to an arraignment, are common to all LaGrange County Jail detainees arrested without a warrant—the potential class members. To win on the merits, each class member would have to advance the same legal theory." *Id.* at 4. Like the plaintiffs in *Dunn* and *Strunk,* in this case Plaintiff has established commonality.

***15** Opposing this conclusion, Defendant relies on two cases, *Wal–Mart* and *Alkire v. Irving,* 330 F.3d 802 (6th Cir.2003). For the reasons discussed above, *Wal–Mart* is inapposite. *Alkire,* while relevant, does not support the weight Defendant attempts to assign to it. The case involved an attempt to certify a class of persons "incarcerated due to failure to pay a civil debt or court costs." *Id.* at 820. The district court denied certification based on numerosity, explaining that although the plaintiff alleged hundreds of potential plaintiffs, a "search of jail records produced only nine potential class members." *Id.* In the alternative, the district court concluded that the common questions would not "predominate" under stage two of the class certification analysis because "the varying reasons for the arrests, varying lengths of stay in jail, varying financial situations, varying reasons for contempt adjudications would [too greatly] impact on the amount of damages any individual class member might be entitled to." *Id.* (internal alteration omitted). The Sixth Circuit succinctly affirmed the judgment of the district court, writing: "The district court neither applied the wrong legal standard in examining these two elements, nor did it misapply the correct legal standard." *Id.* at 821. In this case, as noted, Plaintiff satisfies the numerosity requirement. The predominance requirement (as a general matter and as it relates to damages in particular) is discussed below. And while the Sixth Circuit's discussion *Alkire* informs this Court's predominance analysis, that case does not support the proposition that this case lacks a common question of law or fact. For Class II, Plaintiff has established the commonality required by Rule 23(a)(2).

c

Plaintiff has likewise established the typicality required by Rule 23(a)(3). As noted, the inquiry into typicality and commonality "tend to merge." *Gen. Tel. Co. of S.W. v. Falcon,* 457 U.S. 147, 158 n. 13, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982). Here, Plaintiff alleges that he—like each of the roughly 30,000 members of Class II—was detained for more than forty-eight hours without a judicial determination of probable cause and without extraordinary circumstances meriting the

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extended detention. Because his claim is typical of the class, he has established the typicality required by Rule 23(a)(3).

d

Plaintiff has also established, for reasons discussed above, that he "will fairly and adequately protect the interests of the class." Fed.R.Civ.P. 23(a)(4). There is no evidence a conflict of interest and, conversely, substantial evidence of vigorous prosecution. As with Class I, the incentives of the members of Class II are aligned with each other and with Plaintiff's counsel: maximizing recovery. Plaintiff has established the commonality required by Rule 23(a)(4).

e

Finally, although a closer question, Plaintiff has also established that the common questions pertinent to Class I "predominate over any questions affecting only individual members" and a class action is a superior vehicle "for fairly and efficiently adjudicating the controversy." Fed.R.Civ.P. 23(b) (3).

***16** The question is closer because, although for liability the common questions necessarily predominate over those affecting only individual members, the damages questions do not. Liability depends on Defendant engaging in a pattern of deliberate inaction—a pattern common to all class members. Damages, however, may depend on a variety of circumstances. *See, e.g.,* *Alkire v. Irving,* 330 F.3d 802, 820 (6th Cir.2003). Thus, the issue is whether damages and liability can appropriately be bifurcated. Put differently, must the case be susceptible to both imposing liability and awarding damages on a class-wide basis?

Plaintiff's position is that the two issues can be bifurcated, writing: "Liability is often determined in a class action context separately from damages—be it at summary judgment or through a trial where liability is bifurcated from damages." Pl.'s Resp. to Def.'s Mem. on Permissible Exceptions 2.

As the law presently stands, Plaintiff is correct that "many courts, including the Sixth Circuit, have held that variations in potential damages awards will not defeat class certification." *Laichev v. JBM, Inc.,* 269 F.R.D. 633, 641–42 (S.D.Ohio 2008) (citing *Olden v. LaFarge Corp.,* 383 F.3d

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495, 508–09 (6th Cir.2004); *Bentley v. Honeywell Intern., Inc.,* 223 F.R.D. 471, 487 (S.D.Ohio 2004)).

In *Olden v. LaFarge Corp.,* 203 F.R.D. 254 (E.D.Mich.2001), *aff'd* 383 F.3d 495 (6th Cir.2004), the district court certified a class of "property owners in the City of Alpena, Michigan who claim that their real and personal property have been damaged by toxic pollutants and air contaminants emitted by the defendant during the course of its cement manufacturing operation." *Id.* at 258. Rejecting the defendant's argument that certification was not appropriate "because of the great variance in damages sought by the named class members," the district court explained that the issue of liability from the issue of damages is properly bifurcated in appropriate circumstances. *Id.* at 269, 271 (citing *Little Caesar Enters., Inc. v. Smith,* 172 F.R.D. 236, 267 (E.D.Mich.1997)).

The Sixth Circuit affirmed the judgment, explaining: "As the district court properly noted, it can bifurcate the issue of liability from the issue of damages, and if liability is found, the issue of damages can be decided by a special master or by another method." 383 F.3d at 509 (citing Fed.R.Civ.P. 23(c)(4)(A); *Simon v. Philip Morris Inc.,* 200 F.R.D. 21, 30 (E.D.N.Y.2001)); *see generally* *Carnegie v. Household Int'l, Inc.,* 376 F.3d 656, 661 (7th Cir.2004) ("Rule 23 allows district courts to devise imaginative solutions to problems created by the presence in a class action litigation of individual damages issues. Those solutions include (1) bifurcating liability and damage trials with the same or different juries; (2) appointing a magistrate judge or special master to preside over individual damages proceedings; (3) decertifying the class after the liability trial and providing notice to class members concerning how they may proceed to prove damages; (4) creating subclasses; or (5) altering or amending the class." (internal quotation marks omitted)).

***17** While this is the current state of the law, which this Court is obligated to follow, as noted the Supreme Court has granted a writ of certiorari on the following question: "Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." *Behrend v. Comcast Corp.,* 655 F.3d 182 (3d Cir.2011), *cert. granted sub nom. Comcast Corp. v. Behrend,* 80 U.S.L.W. 3442 (U.S. Jun 25, 2012) (No. 11–864).

In *Behrend,* an antitrust class action, a proposed class of two million cable television subscribers in Philadelphia alleged that a cable television company violated the Sherman Act by conspiring with other cable companies to allocate, and thus concentrate, local market share by entering into unlawful "swap agreements." 655 F.3d at 186 (citing 15 U.S.C. §§ 1, 2). Specifically, the

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plaintiffs alleged that "Comcast contracted with competing cable providers to either acquire them or to 'swap' cable systems it owned in areas outside the Philadelphia [market] for cable systems within the Philadelphia [market]." *Id.* By gaining monopoly power, the plaintiffs alleged, Comcast was able to overcharge its customers. The district court certified the class, finding in pertinent part that the plaintiffs' "damages model provides a methodology that can establish damages on a class-wide basis using common proof." *Id.* at 203. Third Circuit affirmed the judgment of the district court, explaining:

> If allowed to proceed to trial, the class must establish that the injury it suffered from the violation of the antitrust laws is measurable.... The inquiry for a district court at the class certification stage is whether the plaintiffs have demonstrated by a preponderance of the evidence that they will be able to measure damages on a class-wide basis using common proof. Some variation of damages among class members does not defeat certification. Complex and individual questions of damages, however, weigh against finding predominance.

Id. at 203, 204 (internal citations omitted) (citing *In re Hydrogen Peroxide Antitrust Litigation,* 552 F.3d 305 (3d Cir.2008)). The court then found that the plaintiffs established they could measure damages through common proof, writing that the defendant's "attacks on the merits of the methodology ... have no place in the class certification inquiry." *Id.* at 207.

Comcast petitioned the Supreme Court for a writ of certiorari. As noted, the writ has been granted to determine: "Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis." 80 U.S.L.W. 3442.

It is possible, of course, that the Court will answer this question in the negative. *See generally* Judith Resnik, *A Comment on AT & T v. Conception, Wal–Mart v. Dukes, and Turner v. Rodgers,* 125 Harv. L.Rev. 78, 134–153 (2011). It is also possible that the Court will limit its holding to antitrust litigation. *But compare Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007) (applying "plausibility" pleading standard to antitrust claim), *with Ashcroft v. Iqbal,* 556 U.S. 662, 684, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009) ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions.' "). Prior to a decision, however, this Court is bound by the Sixth Circuit precedent, under which liability may be bifurcated from the damages. The Court will certify Class II.

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3

***18** Finally, the parties have informally agreed to defer resolution of Class III. Plaintiff therefore has not identified how many persons are in the class, what the commonality is between the claims, or why these commonalities predominate. The Court declines to certify Class III at present.

B

Having certified Classes I and II, the next issue is the scope of the default. "The effect of a default is to deem admitted all the well-pleaded facts in the complaint." 49 C.J.S. *Judgments* § 273 (2012). Consequently, as a general matter, and as applied to class actions in particular, by defaulting a defendant "has foregone its right to challenge any of the well-pleaded factual allegations in Plaintiff's complaint." *Davis v. Precise Comm'n Servs., Inc.,* No. 1:07–CV–3128–JOF, 2009 WL 812276, at *1 (N.D.Ga. Mar.27, 2009) (citing *Nishimatsu Constr. Co., Ltd. v. Houston Nat'l Bank,* 515 F.2d 1200, 1206 (5th Cir.1976)).

While a default admits well-pleaded facts, it does not admit legal conclusions. "That is, a default does not admit that the facts alleged are in law sufficient to constitute a good cause of action or to entitle the plaintiff to the relief prayed for. Thus, although a defaulting party admits the factual basis of the claims asserted against it, the defaulting party does not admit the legal sufficiency of those claims." 49 C.J.S. *Judgments* § 273 (footnote omitted) (citing *State ex rel. Saginaw Prosecuting Attorney v. Bobenal Investments, Inc.,* 111 Mich.App. 16, 314 N.W.2d 512 (Mich.Ct.App.1981)).

Accordingly, the factual allegations in the complaint are deemed admitted for the entire class. Nevertheless, default is only proper to Class I and II if the factual allegations state claims on which relief can be granted.

1

The Class I claim alleges that being detained overnight or for more than sixteen hours without bedding alleges a cognizable constitutional injury. For the following reasons, the Court will order supplemental briefing on this allegation.

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"In evaluating the constitutionality of conditions or restrictions of pretrial detention," the Supreme Court instructs, "we think that the proper inquiry is whether those conditions amount to punishment of the detainee." *Bell v. Wolfish,* 441 U.S. 520, 535, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). The Court explains that the Due Process Clause requires that "a detainee may not be punished prior to an adjudication of guilt in accordance with due process of law. A person lawfully committed to pretrial detention has not been adjudged guilty of any crime." *Id.* (internal citations omitted) (citing *Ingraham v. Wright,* 430 U.S. 651, 671–72 n. 40, 674, 97 S.Ct. 1401, 51 L.Ed.2d 711 (1977); *Kennedy v. Mendoza–Martinez,* 372 U.S. 144, 165–67, 83 S.Ct. 554, 9 L.Ed.2d 644 (1963); *Wong Wing v. United States,* 163 U.S. 228, 237, 16 S.Ct. 977, 41 L.Ed. 140 (1896)).

"Not every disability imposed during pretrial detention amounts to 'punishment' in the constitutional sense," the Court cautions. *Bell,* 441 U.S. at 537. For example, "Loss of freedom of choice and privacy are inherent incidents of confinement in such a facility. And the fact that such detention interferes with the detainee's understandable desire to live as comfortably as possible and with as little restraint as possible during confinement does not convert the conditions or restrictions of detention into 'punishment.' " *Id.* Therefore a court must draw "a distinction between punitive measures that may not constitutionally be imposed prior to a determination of guilt and regulatory restraints that may." *Id* .

***19** Put differently, the Court must determine whether the conditions of incarceration serve a "legitimate governmental objective" or are punitive. *Thompson v. City of L.A.,* 885 F.2d 1439, 1448 (9th Cir.1989), *overruled on other grounds by* *Bull v. City and County of S.F.,* 595 F.3d 964 (9th Cir.2010) (en banc) (holding "that the rights of arrestees placed in custodial housing with the general jail population are not violated by a policy or practice of strip searching each one of them as part of the booking process").

In *Anela v. City of Wildwood,* 790 F.2d 1063, 1064 (3d Cir.1986), for example, the Third Circuit held that confining arrestees "through the night until almost noon of the next day without drinking water, food, or sleeping facilities ... constituted privation and punishment in violation of the fourteenth amendment." *Id.* at 1069. Likewise, in *Thompson,* the Ninth Circuit held that that confining arrestee without "a bed or even a mattress for two of the nights spent in county jail ... constitutes a cognizable Fourteenth Amendment claim" because it serves no legitimate governmental objective. 885 F.2d at 1448 (collecting cases). And in *Lareau v. Manson,* 651 F.2d 96, (2d Cir.1981) the Second Circuit held that use of floor mattresses for pretrial detainees violated the Fourteenth Amendment when it was "without regard to the number of days for which a prisoner is so confined." *Id.* at 105.

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Based on these authorities, detention overnight without any bedding materials is sufficient to state a constitutional injury. It is not obvious, however, that detention for sixteen hours is sufficient. It may be that sixteen hours is insufficient, but that twenty is, or that twenty hours is insufficient, but that twenty-four is. Supplemental briefing on this issue will be ordered.

2

The Class II claim asserts that Defendant is liable under *Monell* for "an ingrained and long standing" practice of detaining arrestees for more than forty-eight hours without a judicial determination of probable cause. To demonstrate municipal-liability under an "inaction theory," the Sixth Circuit explains, the plaintiff must establish four elements:

> (1) the existence of a clear and persistent pattern of violating federal rights[;] ...
>
> (2) notice or constructive notice on the part of defendants;
>
> (3) the defendants' tacit approval of the unconstitutional conduct, such that their deliberate indifference in failing to act can be said to amount to an official policy of inaction; and
>
> (4) that the defendants' custom was the "moving force," or direct causal link for the constitutional deprivation.

Powers v. Hamilton Cnty. Pub. Defender Comm'n, 501 F.3d 592, 607 (6th Cir.2007) (citing *Doe v. Claiborne Cnty.,* 103 F.3d 495, 507 (6th Cir.1996)).

"Deliberate indifference in this context," the Sixth Circuit emphasizes, "does not mean a collection of sloppy, or even reckless, oversights; it means evidence showing an obvious, deliberate indifference." *Doe,* 103 F.3d at 507.

***20** In *Powers,* for example, the plaintiff sought to impose § 1983 municipal-liability on the public defender's office under an "inaction theory." 501 F.3d at 607. The Sixth Circuit first noted that "[a] municipality cannot be liable for the constitutional torts of its employees; that is, it cannot be liable on a *respondeat superior* theory." *Id.* at 607 (citing *Monell v. Dep't of Soc. Servs.,* 436 U.S. 658, 691, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)). Instead, the municipality is only liable if "the plaintiff establishes that the municipality engaged in a 'policy or custom' that was the 'moving force' behind the deprivation of the plaintiff's rights." *Id.* Pertinent to that case (and

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this), the Sixth Circuit continued: "A § 1983 plaintiff may establish the existence of a custom by showing that policymaking officials knew about and acquiesced in the practice at issue." *Id.* (citing *Memphis, Tenn. Area Local, Am. Postal Workers Union v. City of Memphis,* 361 F.3d 898, 902 (6th Cir.2004)). As the plaintiff was proceeding under an "inaction theory," the court then enumerated the four elements set forth above. The court concluded by finding that the plaintiff had established three of the four elements, but that a genuine issue of fact existed as to the third element —whether the defendant's conduct (more precisely, their lack of conduct[3]) was so deliberately indifferent as to amount to an official policy of inaction.

3 *Cf. Nat'l Fed'n of Indep. Bus. v. Sebelius,* —U.S. ——, ——, 132 S.Ct. 2566, 2589, 183 L.Ed.2d 450 (2012) (Roberts, C.J.) ("To an economist, perhaps, there is no difference between activity and inactivity; both have measurable economic effects on commerce. But the distinction between doing something and doing nothing would not have been lost on the Framers, who were "practical statesmen," not metaphysical philosophers.").

In this case, supplemental briefing will be directed to this element as well. Specifically, the parties will be directed to focus attention on the legal authority regarding whether the factual allegations in the complaint "show a 'clear and persistent pattern' of abuse that the Defendants knew about and acquiesced in." *Powers,* 501 F.3d at 616.

III

Accordingly, it is **ORDERED** that Plaintiff's motion for class certification (ECF No. 32) **GRANTED IN PART AND DENIED IN PART.** Classes I and II are certified; Class III is not.

It is further **ORDERED** that supplemental briefing be provided addressing: (1) whether detention for sixteen hours without any bedding materials is sufficient to state a constitutional injury; and (2) whether the factual allegations in the complaint are sufficient to state a claim under an "inaction theory." Plaintiff's brief is due on or before October 25, 2012. Defendant's response is due on or before November 8, 2012. Plaintiff's reply is due on or before November 15, 2012.

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United States District Court,
W.D. Michigan, Northern Division.

Fingal E. JOHNSON, Plaintiff,
v.
Bill MARTIN, et al., Defendants.
Michael JENKINS, et al., Plaintiffs,
v.
Bill MARTIN, et al., Defendants.

No. 2:00-CV-75, 1:01-CV-515.
|
Dec. 7, 2005.

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OPINION

ENSLEN, Senior J.

***1** This matter is before the Court on class Plaintiffs' Motion for Partial Summary Judgment. Also before the Court is Defendants' Motion to Dismiss or in the Alternative for Summary Judgment. The Court has reviewed the parties' exhaustive briefings and finds oral argument unnecessary. W.D. MICH. LCIVR 7.2(d).

I. BACKGROUND

On March 28, 2000, Plaintiff Fingal E. Johnson filed his Complaint in this matter *in pro per.* Since then, the Court has witnessed nearly five and one half years of litigation and on April 25, 2003, this

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case was certified as a class action. A complete rendition of the entire factual background would add needless complexity and confusion, and therefore, only facts relevant for today's discussion are summarized as follows. [1]

[1] An all-inclusive account can be assembled by review of this Court's Opinions dated March 20, 2001; April 29, 2002; September 27, 2002; January 27, 2003; April 25, 2003; and October 7, 2003.

The dispute in this case arose when the Michigan Department of Corrections ("MDOC") classified the Melanic Islamic Palace of the Rising Sun and its incarcerated members ("Melanics") as a security threat group. [2] Because of their security status, MDOC ordered Melanics to renounce their membership or face a higher security classification. Pursuant to MDOC policy, prisoners designated as security threat group members are prohibited from possessing "documents, materials, symbols, colors or pictures of an identified [security threat group]." MDOC POLICY DIRECTIVE 04.04.113 (effective Dec. 12, 1996). As a result of the Melanic's designation, MDOC Deputy Director Dan Bolden issued a January 12, 2000 memorandum wherein he advised that:

[2] According to Plaintiffs, the Melanics are a religious sect significantly influenced by Islam and other spiritual philosophies. Purposefully nondescript, the Court will endeavor to describe the Melanics no further as the Court recognizes it wades in dangerous waters when attempting to depict another's faith with any sort of precision.

Each facility should get a current roster of Melanics. Prisoners should be given seven (7) business days to turn in [Melanic] literature and materials. In addition, they should have the opportunity to renounce their affiliation/change affiliation at the time of the interview. Picking up literature should be handled carefully (items like Qurans and Bibles should be left alone). Group worship materials such as the Melanic flag should be removed from the facility and disposed of with care to avoid a negative/violent response....
As ordered, Melanics were then given seven business days to either deliver all Melanic materials to MDOC or dispose of it on their own. Melanic material was identified as anything evidencing Melanic membership (pictures, clothing, jewelry, flags, writings, *etc.*).

In January 2000, Melanics residing outside MDOC institutions began mailing Melanic writings to those incarcerated. MDOC rejected the mailings as violative of MDOC mail policy. MDOC POLICY DIRECTIVE 05.03.118 (effective July 19, 1999) (prohibiting mail "that is a threat to the security, good order, or discipline of the facility...."). Of specific concern to Plaintiffs are five related Melanic writings (hereinafter "Melanic Literature") that they were ordered to relinquish and are now prohibited from possessing. Plaintiffs contend that Melanic Literature is essential to

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practicing their religion. On March 16, 2000, MDOC Administrative Assistant Julie Southwick wrote:

> ***2** Based upon correspondence with the Attorney General, it appears that MDOC facilities issued a "total ban" on Melanic literature. Even though we have withdrawn recognition of the Melanics as an organized religion, a total ban has been held contrary to case law. [referencing, *Murphy v. Miss. Dep't of Corr.,* 814 F.2d 1252 (8th Cir.1987)].... *Facilities must review each peace of literature before banning it to determine whether the particular item is a threat to security or the good order of the institution.*

(emphasis in original). Plaintiffs claim they have not had access to Melanic Literature since January 2000.

II. STANDARD OF REVIEW

Because Defendants' Motion to Dismiss has asked this Court to consider matters outside of the pleadings, the Court will construe Defendants' dismissal arguments, as well as their summary judgment arguments, under a summary judgment standard. FED. R. CIV. P. 12(b). Deciding a motion for summary judgment requires the Court to determine if there is no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). The Court must consider the record as a whole by reviewing all pleadings, depositions, affidavits and admissions on file. *Matsuhita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). The facts are to be considered in a light most favorable to the non-moving party, and "... all justifiable inferences are to be drawn in his favor." *Schaffer v. A.O. Smith Harvestore Prod.,* 74 F.3d 722, 727 (6th Cir.1996) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)) (other citations omitted).

Once the movant satisfies his burden of demonstrating an absence of a genuine issue of material fact, the non-moving party must come forward with specific facts showing that there is a genuine issue for trial. *Kramer v. Bachan Aerospace Corp.,* 912 F.2d 151, 153-54 (6th Cir.1990). The non-moving party may not rest on its pleadings but must present "specific facts showing that there is a genuine issue for trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986) (quoting FED. R. CIV. P. 56(e)). It is the function of the Court to decide

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"whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson,* 477 U.S. at 251-52. The question is "whether a fair-minded jury could return a verdict for the [non-moving party] on the evidence presented." *Id.* at 252. Since both parties have moved for summary judgment or for partial summary judgment, each will be accorded the status of movant and non-movant when applicable.

III. ANALYSIS

Plaintiffs have brought these consolidated suits under Title 42 of the United States Code, sections 1983 and 2000cc-1, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.[3] Section 1983, while needing no introduction, provides a cause of action to redress violations of federal law at the hands of state actors. Using section 1983, Plaintiffs claim Defendants violated their First Amendment rights. Section 2000cc-1 of the Religious Land Use and Institutionalized Persons Act ("RLUIPA") does not share the same celebrity. The Act provides in pertinent part that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution ... unless the government demonstrates that imposition of the burden ..." furthers "a compelling governmental interest" and is done so by the least restrictive means. As for Plaintiffs' constitutional claim, the Due Process Clause prohibits states from depriving any person of life, liberty, or property without due process of law. U.S. CONST. amend. XIV, § 1.

3 Neither Plaintiffs nor Defendants have moved for summary judgment on Plaintiffs' equal protection claim in their instant Motions.

***3** The parties, and prior Opinions of this Court, have distilled the Courts' focus today to whether a ban on Melanic Literature violates the First Amendment, Due Process Clause, or RLUIPA. However, before addressing this question the Court must pause to assess Defendants' asserted qualified immunity because the privilege invoked "is an *immunity from suit* rather than a mere defense to liability...." *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001) (citing *Hunter v. Bryant,* 502 U.S. 224, 227, 112 S.Ct. 534, 116 L.Ed.2d 589 (1991)) (emphasis in original).

A. First Amendment and Qualified Immunity

Plaintiffs claim that Defendants violated their First Amendment rights by confiscating all Melanic materials and banning incoming Melanic material by mail.[4] In other words, Plaintiffs claim

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Defendants totally banned Melanic material from MDOC institutions. Defendants contend the deprivation of Melanic material was reasonable in light of security concerns and that they enjoy qualified immunity. [5]

4 In a January 27, 2003 Opinion the Court observed that it did not have enough information regarding what Melanic materials were banned to decide on Defendants' entitlement to qualified immunity. The Court has since been sufficiently advised in the premises and is now prepared to make this decision.

5 Defendants also assert that Melanic materials were never totally banned; however, because the Court finds Defendants enjoy qualified immunity even if they did totally ban Melanic material, this point will be taken up in the Court's discussion of injunctive relief. *See* Section III, D1, *infra.*

Qualified immunity protects government officials from monetary liability unless they violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982). When determining if an officer is entitled to qualified immunity, the Sixth Circuit Court of Appeals endorses a three-part test. *Williams v. Mehra,* 186 F.3d 685, 691 (6th Cir.1999). First, Plaintiffs have to show a violation of a constitutionally or statutorily protected right; second, they must be shown that the right was clearly established at the time such that a reasonable official would have understood his behavior violated that right; and third, Plaintiffs have to allege sufficient facts, and support the allegations by sufficient evidence, to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established rights. *Scicluna v. Wells,* 345 F.3d 441, 445 (6th Cir.2003).

On January 12, 2001, Plaintiffs enjoyed a constitutionally protected right to freely exercise their religion while incarcerated, *Cruz v. Beto,* 450 U.S. 319, 322 n. 2 (1972), and, subject to limitation, receive mail. *Thornburgh v. Abbott,* 490 U.S. 401, 407-09, 109 S.Ct. 1874, 104 L.Ed.2d 459 (1989). The more difficult question is whether this right was clearly established, or specifically, whether it was clearly a constitutional violation to totally ban all Melanic material in light of Plaintiffs' security threat group status.

When determining what behavior is clearly constitutionally proscribed, the Sixth Circuit has instructed that:

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> [A] district court must find binding precedent by the Supreme Court, its court of appeals or itself. In an extraordinary case, it may be possible for the decisions of other courts to clearly establish a principle of law. For the decisions of other courts to provide such "clearly established law," these decisions must both point unmistakably to the unconstitutionality of the conduct complained of and be so clearly foreshadowed by applicable direct authority as to leave no doubt in the mind of a reasonable officer that his conduct, if challenged on constitutional grounds, would be found wanting. [A] mere handful of decisions of other circuit and district courts, which are admittedly novel, cannot form the basis for a clearly established constitutional right in this circuit.

***4** *Ohio Civil Serv. Employees Ass'n v. Seiter,* 858 F.2d 1171, 1177-78 (6th Cir.1988); *see also* *Fisher v. Harden,* 398 F.3d 837, 845-46 (6th Cir.2005). Neither the parties nor the Court is aware of any controlling Sixth Circuit precedent prior to January 12, 2001, and consequently, Plaintiffs have pinned their hopes on *Murphy v. Miss. Dep't of Corr.,* 814 F.2d 1252 (8th Cir.1987) and *Williams v. Brimeyer,* 116 F.3d 351, 353 (8th Cir.1997), to defeat Defendants' qualified immunity.[6] In *Murphy* and *Williams,* the Eighth Circuit Court of Appeals held that a blanket denial of religious materials, even when such materials were also in violation of prison rules, was too broad a policy and ran afoul of the First Amendment. "A total ban on [prohibited religious] materials is more restrictive of prisoner First Amendment rights than necessary to maintain prison security." *Murphy,* 814 F.2d at 1257.

6 Plaintiffs' citation to *McCabe v. Arave,* 827 F.2d 634 (9th Cir.1987) is unavailing as there was no total ban in that case. In *McCabe,* prisoners were limited but never completely prevented from possessing religious materials.

As in *Seiter,* this Court is unwilling to find that *Murphy* and *Williams* clearly established a constitutional violation in Plaintiffs' favor. Neither decision issued from the Sixth Circuit and:

> Unless the defendants in this case (all of whom are presumably non-lawyers) had a quite extraordinary familiarity with the contents of the Federal Reporter, it is difficult to see how [two][ ] decision[s] of another circuit could reasonably be expected to have changed the defendants' perception of how the Constitution is

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> understood in this circuit. *Harlow v. Fitzgerald* teaches that if a qualified-immunity defense is to be defeated on the ground that the constitutional violation was obvious, the constitutional rights in question must have been "clearly established" and must have been the sort that a "reasonable person" would have known about. *Harlow,* 457 U.S. at 818.[Two] idiosyncratic opinions[s] from the court of appeals for another circuit w[ere] hardly sufficient to put the defendants on notice of where this circuit or the Supreme Court might come out on the issue in question.

Davis v. Holly, 835 F.2d 1175, 1182 (6th Cir.1987). Furthermore, *Murphy* and *Williams* are readily distinguishable from Defendants' confiscation order as neither decision involved a security threat group within the prison on the same level as the case at bar. Thus, the Court finds that because it was not clearly established law that a total ban of Melanic material was constitutionally forbidden, Defendants are immune from suit in damages on Plaintiffs' First Amendment claim.

B. Due Process and Qualified Immunity

Plaintiffs also claim that Defendants violated their procedural due process rights when Defendants banned Melanic material without a hearing. Defendants contend that a hearing was not required before confiscating Melanic material and that Plaintiffs could have grieved this issue had they chose to.

The Supreme Court has "repeatedly held that prisons are not beyond the reach of the Constitution. No 'iron curtain' separates one from the other ... and thus, [p]risoners may [ ] claim the protections of the Due Process Clause. They may not be deprived of life, liberty, or property without due process of law." *Wolff v. McDonnell,* 418 U.S. 539, 555-56, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974). Thus, it is clearly established that at a minimum, the Due Process Clause requires that prisoners receive notice and the opportunity to be heard before deprived of life, liberty, or property. *Id.*

***5** In this case, Defendants gave Plaintiffs sufficient notice that MDOC was going to confiscate all Melanic material within seven business days; and furthermore, there was an ample opportunity for an inmate to grieve that confiscation order because prisoners who remained in possession of Melanic materials were afforded contraband hearings. In fact, 80 such hearings were held and six inmates successfully proved that their Melanic materials were not contraband. Thus, contrary to Plaintiffs' assertion, Plaintiffs did receive the constitutionally required notice and opportunity to be heard before they were dispossessed of their property. Consequently, Plaintiffs have not shown

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that Defendants' behavior was objectively unreasonable under the Due Process Clause. *Scicluna,* 345 F.3d at 445 (citing *Williams,* 186 F.3d at 691). Therefore, Defendants are immune from suit in damages on Plaintiffs' due process claim.

C. RLUIPA and Qualified Immunity

Plaintiffs further claim that Defendants violated RLUIPA by confiscating all Melanic materials. On November 7, 2003, the Sixth Circuit Court of Appeals found RLUIPA violated the Establishment Clause and was unconstitutional. *Cutter v. Wilkinson,* 349 F.3d 257 (6th Cir.2003). The Supreme Court granted *certiorari* on October 12, 2004, and this Court stayed decision of the parties' motions until the Supreme Court decided *Cutter.* On May 31, 2005, the Supreme Court issued its decision on the constitutionality of RLUIPA. *Cutter v. Wilkinson,* --- U.S. ----, 125 S.Ct. 2113, 161 L.Ed.2d 1020 (2005). In an opinion written by Justice Ginsburg, the Court held that RLUIPA was compatible with the Establishment Clause as it found RLUIPA alleviates exceptional government-created burdens on private religious exercise, adequately accounts for burdens on nonbeneficiaries, and is faith neutral. *Id.* at 2121.

Turning to Defendants' asserted qualified immunity in light of the Supreme Court's decision in *Cutter,* Defendants contend that the statutory framework controlling religious exercise within the prison setting was either not protected by an act of Congress or was not clearly established, and therefore, they are entitled to qualified immunity. Congress has twice passed legislation aimed at reinforcing prisoners' religious freedoms. Congress first passed the Religious Freedom Restoration Act of 1993 ("RFRA") to prohibit government from substantially burdening a person's exercise of religion unless it demonstrates such burdens are in furtherance of a compelling governmental interest and are the least restrictive means to do so. 42 U.S.C. § 2000bb-1. On June 25, 1997, the Supreme Court found that in enacting RFRA, Congress had exceeded its remedial powers under the Fourteenth Amendment and invalidated RFRA. *City of Boerne v. Flores,* 521 U.S. 507, 532-36, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997).

On September 22, 2000, Congress went back to the drawing board and passed RLUIPA. RLUIPA was specifically limited in scope to programs receiving federal funds or affecting commerce. 42 U.S.C. § 2000cc-1. Save for the inserted congressional limitations and stylistic changes, 42 U.S.C. § 2000cc-1 (RLUIPA) and 42 U.S.C. § 2000bb-1 (RFRA) are functional equivalents. Thus, between June 1997 and September 2000, the legislative landscape was devoid of any statutory guidance for prison administrators to evaluate a prisoner's religious needs.

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***6** As noted, Deputy Director Bolden issued his order to confiscate Melanic material on January 12, 2000, in the middle of the statutory gap. The Court finds that at the time of the confiscation order, Plaintiffs did not enjoy any statutory religious protection, and thus, Defendants are immune from suit in damages on Plaintiffs' RLUIPA claim. In addition, the Court finds its reasoning in section A of this Opinion duly applicable and would also entitle Defendants to qualified immunity.

D. Injunctive Relief

While Defendants enjoy qualified immunity from suit in damages, no such privilege exists for claims seeking declaratory or injunctive relief. *Flagner v. Wilkinson,* 241 F.3d 475, 484 (2001). Plaintiffs Motion seeks a declaration that their rights were violated and injunctive relief prohibiting Defendants from totally banning Melanic Literature.[7] Therefore, the Court will address the merits of Plaintiffs' First Amendment, Due Process, and RLUIPA claims in equity.

[7] Plaintiffs have also sought an injunctive order requiring Defendants to replace seized Melanic materials and reimburse Plaintiffs for the cost of mailing Melanic materials out of MDOC institutions. The Court finds this relief is actually a compensatory damage award styled as injunctive relief and as discussed earlier, Defendants are immune from suit in damages. *Cf. Edelman v. Jordan,* 415 U.S. 651, 666, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974) (when a defendant is immune from damages, merely labeling relief sought as "equitable" does not create an available injunctive remedy when effect of injunction is essentially a money judgment).

1. First Amendment

Central to Plaintiffs' First Amendment claim is whether Defendants' ban on Melanic Literature is reasonably related to a legitimate penological objective within the meaning of *Turner v. Safley,* 482 U.S. 78, 88-89, 107 S.Ct. 2254, 96 L.Ed.2d 64 (1987).[8] The Supreme Court has articulated a four-factor test to assure that "prison administrators ... and not the courts ... make the difficult judgments concerning institutional operations." *Id.* at 89 (citing *Jones v. North Carolina Prisoner's Union,* 433 U.S. 119, 128, 97 S.Ct. 2532, 53 L.Ed.2d 629 (1977)). First, there must be a "valid, rational connection" between the prison regulation and the legitimate governmental interest put forward to justify it. *Id.* (quoting *Block v. Rutherford,* 468 U.S. 576, 586, 104 S.Ct. 3227, 82 L.Ed.2d 438 (1984)). Second, the reviewing court is advised to consider whether there are "alternative means of exercising the right that remain open to the prison inmate." *Id.* at 90. Third, the impact of the accommodation that the "asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally" is also relevant.

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Id. Finally, the existence or absence of ready alternatives is evidence of the reasonableness of a prison regulation. *Id.*

8 The parties' motions overlap as to whether the confiscation order was reasonable and will therefore be considered as competing motions for summary judgment. *See* *Lansing Dairy, Inc. v. Espy,* 39 F.3d 1339, 1347 (6th Cir.1994).

After applying the *Turner* test to the facts of this case, it is apparent that no First Amendment violation may follow. First, the confiscation order bears a rational relationship to prison security. Several Melanics, though the exact number is controverted, were involved in a prison riot at MDOC's Chippewa Valley facility. Thereafter, Melanics were designated a security threat group. Defendants have articulated that Melanic Literature espouses violence, racism, and an alternate hierarchical order within the prison. The confiscation order clearly bears a rational relationship to Defendants' important security interests.

With regard to *Turner'* s second factor, Defendants contend that because Plaintiffs were allowed access to Bibles and Qurans and were allowed to practice individual rituals, alternate means of practicing the Melanic faith remained open. Plaintiffs have introduced expert testimony indicating that inmate access to Melanic Literature is essential to their faith. While this factor may tip in Plaintiffs' favor, the Court is mindful that it is to be "particularly conscious of the 'measure of judicial deference owed to corrections officials." ' *Id.* at 89 (citing *Pell v. Procunier,* 417 U.S. 817, 827 (1974)).

***7** As for the third *Turner* factor, allowing Melanic material into MDOC institutions would have a negative impact on guards, other inmates, and prison resources as Melanic Literature advocates and embeds an alternate power structure within MDOC institutions that is detrimental to the working order and security of those institutions. Prisoners would be under the authority of two masters with undoubtedly contradictory orders. Plaintiffs have challenged Defendants' appraisal of such hierarchical organizations with expert testimony, suggesting that Defendants' concerns are exaggerated. In light of *Turner'* s deferential posture, this Court will not supplant the experience and judgment of MDOC officials for the opinion of a retained penologist.

In line with the final *Turner* factor, Plaintiffs posit that because Melanic Literature was previously allowed in MDOC institutions, allowing its return will have a *de minimis* effect on Defendants' penological interest. Plaintiffs' supposition overlooks a critical aspect of the Melanics in that they are now a security threat group. MDOC officials would have to scrutinize each piece of Melanic Literature with greater detail, now being forewarned of Melanic Literature's proclivity for violence and racism. The Court has observed that Melanic Literature numbers in the hundreds of pages,

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most single-space type. Requiring MDOC officials to weed through Melanic Literature and excise prohibited materials would certainly not engender a *de minimis* effect.

On the balance, and especially in light of *Turner,* the Court finds that Defendants' confiscation order was reasonably related to their penological needs and will grant their motion for summary judgment on this ground. Conversely, Plaintiffs' motion will be denied.

2. Due Process [9]

[9] The parties' motions overlap on Plaintiffs' due process claim and will therefore be considered as competing motions for summary judgment. *See* *Lansing Dairy,* 39 F.3d at 1347.

As observed in section B, Plaintiffs were afforded notice and the opportunity to be heard before their Melanic materials were confiscated. It is clear to the Court that Plaintiffs have been accorded all the process they are due. *Wolff,* 418 U.S. at 555-56. Thus, the Court will grant Defendants' Motion and deny Plaintiffs' motion on this ground.

3. RLUIPA [10]

[10] The parties' motions overlap on Plaintiffs' RLUIPA claim and will therefore be considered as competing motions for summary judgment. *See* *Lansing Dairy,* 39 F.3d at 1347.

Apparently *Turner v. Safely* did not sit well with members of Congress as they worked to pass RFRA, and eventually RLUIPA, effectively overruling *Turner.* RLUIPA provides in pertinent part that "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution ... unless the government demonstrates that imposition of the burden ..." furthers *"a compelling governmental interest"* and is done so *"by the least restrictive means."* 42 U.S.C. § 2000cc-1. (emphasis supplied). It is no longer sufficient for prison officials to show a reasonable relation between its regulation and penological interests.

Assuming without deciding that Defendants' security interest is compelling, less restrictive means exist to satisfy their penological interests. Section D1 of this Opinion evinces that MDOC officials can screen Melanic Literature to assure prohibited materials are prevented entry into MDOC institutions. [11] While this is just one example, it demonstrates that a total ban on Melanic Literature is not the least restrictive means available to assure prison security, and consequently, Defendants have not met their burden under 42 U.S.C. § 2000cc-1.

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[11] The Court recognizes its Opinion may appear somewhat schizophrenic in that section D1 appears contradictory to section D3. This is purely the result of the heightened burden imposed on Defendants by RLUIPA.

***8** Thus, the Court will reluctantly grant Plaintiffs' motion and deny Defendants' motion as they relate to RLUIPA. Congress has taken the Supreme Court's fears in *Turner* and made them a reality. Courts are now "the primary arbiters of what constitutes the best solution to every administrative problem," as RLUIPA " 'unnecessarily perpetuate[s] the involvement of the federal courts in affairs of prison administration." ' *Turner,* 482 U.S. at 89 (citing *Procunier v. Martinez,* 416 U.S. 396, 407, 94 S.Ct. 1800, 40 L.Ed.2d 224 (1974)). RLUIPA obligates this Court to cast aside its doubts about the dubious role it will play in prison administration, and therefore, this will Court enjoin MDOC from totally banning Melanic Literature from its institutions. [12]

[12] The Court finds that an injunction preventing Defendants from totally banning Melanic materials is narrowly tailored, extends no further than necessary, and represents the least intrusive means necessary to correct Defendants' RLUIPA violation. 18 U.S.C. § 3626. The Court has also considered the potential adverse impact on prison security. *Id.*

E. Administrative Exhaustion

Defendants have reiterated through various filings, most recently their instant Motion, that Plaintiffs' failure to exhaust is fatal to their claims. In an April 29, 2002 Opinion, this Court found exhaustion was not required and has been presented nothing since then to upset that finding.

F. Defendants' Dismissal Arguments as to Plaintiffs Jenkins and the Melanic Islamic Palace of the Rising Sun

As noted, Defendants have moved to dismiss this action based on evidence outside the pleadings, and therefore, the Court is guided by Rule 56 rather than Rule 12(b). *See* FED. R. CIV. P. 12(b). Defendants contend that Plaintiffs' Amended Complaint is devoid of any allegations applicable to Plaintiff Michael Jenkins and aver that he cannot demonstrate any facts supporting a cause of action. Defendants also contend that no facts support a claim in favor of Plaintiff Melanic Islamic Palace of the Rising Sun. [13]

[13] The Melanic Islamic Palace of the Rising Sun is also a non-profit religious corporation recognized by the state of Michigan and Plaintiff Jenkins is its president.

Plaintiffs Jenkins and the Melanic Islamic Palace of the Rising Sun oppose dismissal and believe they have alleged facts that support a finding of associational standing on behalf of their members.

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To assert associational standing, three prerequisites must be met: (1) the members of the association must otherwise have standing to sue; (2) the interests that the organization seeks to protect must be germane to the purpose of the organization; and (3) neither the claim asserted nor the requested relief necessitates the participation of the individual members of the lawsuit. *Warth v. Seldin,* 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975); *See also* *Pennell v. City of San Jose,* 485 U.S. 1, 7, 108 S.Ct. 849, 99 L.Ed.2d 1 (1988). The Court finds that Plaintiffs Jenkins and the Melanic Islamic Palace of the Rising Sun have a sufficient standing to remain in this action. This is particularly true given the injunctive nature of this case that will inure to the benefit of Melanics actually injured. *Warth,* 422 U.S. at 515. Thus, the Court will deny Defendants' Motion concerning dismissal of Plaintiffs Jenkins and the Melanic Islamic Palace of the Rising Sun.

IV. CONCLUSION

Therefore, the Court will grant Plaintiffs' Motion for Partial Summary Judgment as to their claim under RUILPA and deny the Motion in all other respects. The Court will further grant Defendants summary judgment as to qualified immunity and summary judgment as to Plaintiffs' due process claim. In all other respects, Defendants' Motion will be denied. An Order, Injunction and Partial Judgment consistent with Opinion shall be entered.

All Citations

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Exhibit 22 - 22. Johnson v. Martin